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C. M.

THE
JOURNAL OF JURISPRUDENCE

1889

VOL. XXXIII.

EDINBURGH

T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET

GLASGOW: THOMAS MURRAY AND SON; AND J. SMITH AND SON

ABERDEEN: WYLLIE AND SON

LONDON: STEVENS AND SONS

MDCCCLXXXIX

MORRISON AND GIBB, PRINTERS, EDINBURGH.

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THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Breakdown of the English Circuit System.—The depleted state of the English Bench during last month has again raised the question of the reform of the Circuit System in England. The arranging of the several Circuit sittings is a recurring difficulty with the judges of the Queen's Bench Division. Their lordships appear to be driven to their wits' end in the attempt to reduce to a minimum the huge inconvenience which the absence of so many judges on Assize always creates in the business of the ordinary Courts in London. The great towns in the provinces provide a heavy list of work for the Assizes. The number of towns to be visited is considerable. So it happened that from November 27th until the end of term eight of the Common Law judges were out of town. The Special Commission being then in session, there remained available in London four Common Law judges, viz. the Lord Chief-Justice, Mr. Justice Manisty, Baron Huddleston, and Mr. Justice Denman. Of this thin battalion, one had to sit daily in chambers. Three judges, therefore, were left to deal with the common jury list, the special jury list, the without jury list, and various other matters. Then, too, since misfortunes never come single, Mr. Justice Manisty was for some time seriously indisposed. Now this state of things,—not exceptional at all, for although the Special Commission is temporary, a similar state of congestion occurs regularly as the Circuits come round,—naturally causes

much irritation. Both on the part of provincial and metropolitan litigants dissatisfaction has been loudly expressed. The latter complain of delay in their suits; the former of a tendency to perfunctory and impatient despatch of their business. Remedies have been called for, and suggestions have been forthcoming. It would seem to be impossible to improve the existing system further. All that ingenuity can suggest and earnestness can carry out has, we may safely assume, been already tried. "Either," says the *Spectator*, "the number of judges must be increased, or something must be done in the direction of decentralization; or, in other words, the jurisdiction of County Courts and Quarter Sessions must be extended." There is, indeed, no escape from this alternative. No other course seems possible. The obstacle in the way of either of these reforms is, of course, the same formidable one. Both would involve the spending of more money. A larger grant will be hard to wring from the Treasury, since even the present outlay has been carped at. Yet the deadlock must be removed. Without the spending of more money its removal is not possible.



Contempt of Court.—Contempt of Court would appear to be in the air, not to say upon the brain at present. Several gentlemen of undoubted character and position organize a political meeting, and amongst other arguments they propose to adduce Miss Norah Fitzmaurice, who had given evidence before the Parnell Commission, to recount the story of her sufferings. The attention of the Commissioners is called to the matter. The gentlemen are convened, and it is only by making an abject apology that they escape fine or imprisonment. This seems to carry the doctrine of contempt very far,—so far, in fact, that we do not understand it. Indeed, in view of the proceedings, we think it prudent to caution our readers to abstain from all discussion, in public or private, of the Irish question until the labours of the Commission are concluded.



Local Government Bill for Scotland.—As is well known, this Bill will be introduced early in next session of Parlia-

ment. The general outline of the measure has already, we believe, been planned and adjusted by the Ministers to whom this duty has been entrusted by the Cabinet. The chief responsibility for the form of the Bill will rest, it is understood, with Mr. C. T. Ritchie and the Lord Advocate. The moulding and arrangement of the details of the measure will be a matter of much difficulty and complexity. Nothing will, of course, transpire until Parliament assembles in spring, and leave is asked to bring in the Bill.

* * *

The Court of Session and the Crofters.—A large number of summonses were called the other day at the instance of the Gordon Cathcart Trustees against farmers and crofters in the northern isles, who were several years in arrears in payment of their rents. This action upon the part of the proprietors has led to a question in the House of Commons by Mr. Fraser-Mackintosh, who asked the Lord Advocate as to the facts of the case, and whether he will, before next session, consider as to the advisability of introducing a Bill excluding prosecutions for ordinary debts in the Supreme Courts of Scotland for sums under £100 sterling. The Lord Advocate, in reply, after explaining that the average of the sums sued for in the pending proceedings was a little under £50 each, stated that the power of the Court of Session to withhold costs, or to give costs only on the scale of the inferior Courts, was generally found to prevent litigants resorting to its jurisdiction with cases which ought properly to go to local tribunals. The proposal to exclude from the Court of Session actions for ordinary debts under £100 seemed to the Lord Advocate to be uncalled for and inexpedient. There appear to be no bounds to the ambition of the crofters. They seem quite determined to set the world right. Not content with assailing our land system and our criminal procedure, they are resolved to revolutionize the conduct of civil process in private suits. Meanwhile it is satisfactory to know that the result of the action taken has been the payment of a large amount of rent impudently withheld for years by solvent tenants, and to which, as Sir William Harcourt has well put it, the proprietor had as good a right as one has to the coat upon one's back.

A French Judge.—Even in France there are apparently limits to the appreciation of enterprise. The other day a judge, who presided over one of the Courts in Paris, was removed from office because two enterprising acts of his did not commend themselves to those in authority. On one occasion, after examining a witness for a very protracted period in Court, this crafty official invited him to dine at a neighbouring restaurant. At the feast the judge did not stint his wine, and having by a series of questions elicited from his tipsy guest some very damaging facts, he had him arrested forthwith! In this instance the wily judge was only having recourse to long-known stratagem—although in employing it he was certainly stealing a march on members of his class. In the other case, however, he showed greater enterprise. He called in the aid of science. He talked through a telephone with a witness, pretending that he (the judge) was one of the persons accused in the case, and thus led the unwary man to betray both himself and his accused friend. We trust we may be pardoned for saying, that the fact that this zeal was ill-received is the most creditable thing we have heard of the French Criminal Courts for a long time. *A priori* we should have expected promotion in the service to follow in the case of this diligent judge. The browbeating, badgering, worrying of an accused person, the severe cross-examination to which he is subjected, the deep-laid and persevering traps employed to involve him in damaging admissions, which are the daily, the ordinary, the accepted conduct of a French judge, are not so very far removed in method and result from the subterfuges of this over-zealous functionary. But it would seem that there is a line and limit somewhere, and that there are people who have the faculty of discerning it. Such tricks transgress it.



The Lady Barrister again.—She has not, as yet, appeared within the United Kingdom. But in several countries, with which we are happily at peace, and on whose exports we levy no prohibitive customs, the lady has at different times arisen. Now here, now there, she has raised her voice, with swift transition from place to place, like the ghost of Hamlet's ill-

used father in the cellarage. And in these latest days, in Brussels, on December 3rd, Mdlla. Popelius claimed to be sworn as a barrister at the Royal Courts of Justice. It was argued—that is the impersonal phraseology of the report, and we are left in irritating ignorance as to whether Mademoiselle gave the Court a taste of her oratory—that, *in the absence of any law* on the subject, a lady ought to be admitted to practise at the bar. Alas! gallantry is no part of the accomplishments of Monsieur le Procureur-General of His Majesty the King of the Belgians. That it should have to be recorded! M. Van-ochoor stoutly opposed the lady's claim! He contended that "the functions of an advocate constituted essentially a manly office." The Court took the same view, and decided against the claims of the lady on general grounds, much in the same way as a south country Sheriff recently rejected the claim of a female to the franchise. It may be taken, then, as sound law, that for a *munus publicum* hitherto filled only by men, women are ineligible even in the absence of any express statutory or common law disqualification.

* * *

The Edlingham Burglars.—It is quite right that the men who have been incarcerated for nine years on a wrongful conviction should be compensated for their sufferings from the public treasury. The public desires to atone, in so far as possible, for their wrongs; and the public has a right to be generous with its own. But a great deal of nonsense has been written upon the subject. Compensation has been claimed as a right. We have been told that "the law has grossly blundered,—the law must make good the mistake." But, in the first place, the law has no funds; and, in the second place, the law has not blundered. If anybody has blundered, it is the jury who convicted the men. But there is no evidence that the jury blundered. Indeed, so far as we can judge, the jury returned a proper verdict upon the evidence before them. It is a fallacy that because the facts are not as the verdict finds them to be, therefore the verdict is a blunder. If, on returning home, I find a cat in the room, the cage torn down and broken, and the bird gone—all save the feathers; and if I then conclude that the cat killed the bird, I

have not blundered, although what really happened was that the bird died of apoplexy, and the innocent cat, seeing what had happened, thought it as well to eat the carcass before it was cold, and so pulled down and broke into the cage. A litigant, who in a previous case had been convicted of fraud, was pleading a cognate case before the Inner House, and the Lord President made some observation as to what had been made out against him in the previous trial. The litigant indignantly protested against the justice of the conclusion there reached. "Well," observed the Lord President, "I don't say you did it; all I say is that it was *proved* that you did it." In the case figured above the cat did not kill the bird, but on the evidence it was clearly *proved* that it did so.



No doubt it is sad that evidence should sometimes mislead, and it is lamentable when this occasions the conviction of the innocent. But it is lamentable, too, when a man is deprived by accident of his sight or his limbs; yet the public never dreams of compensating him. If the State employs imperfect machinery for the detection of crime, and the result is the conviction of the innocent, then clearly the people so punished have a claim to compensation. But if the State provides the best and most effective machinery known for the detection and the punishment of crime, the State is not responsible if occasionally, through human fallibility, the innocent suffer for the guilty. Fortunately, cases of erroneous conviction are so rare, and the public are always so generously disposed when a mistake is found out, that it is not likely in this connection ever to be necessary to look into the strict principle of the matter. But there is a tendency to apply the same sort of principle in a class of cases which are far more common. Whenever anybody is put to any inconvenience, trouble, or indignity by the action of the officers of the law, acting in the execution of their duty, under an erroneous impression, the cry is at once raised for compensation from the public funds. The Courts of law have done their utmost to discourage such claims, and have invariably absolved from liability where the mistake in making an erroneous charge or a wrong apprehension has been a *bona fide* one. Under any

other rule the administration of justice would be paralysed: information would be withheld from the police, and they would be afraid to act upon such information as they might possess. Baffled in the law Courts, the promoters of this kind of agitation have betaken themselves to the press and to the political agitators who are seeking to lower the tone of social duty. No one can read the questions addressed in the House of Commons to the Lord Advocate without perceiving how far this movement has been carried. Certain members of Parliament seem to make it an almost absolute presumption that where there is a conflict between authority and a private individual, authority is in the wrong, and guilty of a gross abuse of power.



The Suggestion of Curators ad litem from the Bar.—A few years ago the practice prevailed to a very large extent of suggesting from the Bar the names of persons to whom remits were to be made, or fiduciary appointments incident to a process to be given. A wholesome check was put upon this practice by several recent junior Lord Ordinaries, notably by Lord Trayner. But the practice still endured of suggesting the names of *Curators ad litem* in petitions. We observe, however, that Lord Wellwood has now taken a further step in what cannot but commend itself as the right direction, by declining to accept suggestions for these appointments from the Bar, and appointing gentlemen of his own selection. The Curator is, in general, appointed to safeguard an interest adverse to that of the petitioner, and it is most anomalous to leave the selection of such an officer in the hands of the petitioner's agent. Naturally enough the agent selects some *protegé* of his own, very often a fledgling from his office, who has just set up on his own account, and is still very much beholden to his old master. A Curator so selected is not in a favourable position to take up an independent attitude, and although, thanks to the efficiency of the reporters selected by the Court, no serious mischief has perhaps resulted, it is well that the risk of such an occurrence has been removed by a term having been put to a thoroughly unsound system.

The Scottish Legal Estimates.—Criticism had spent its force before these estimates were reached, and there was a genuine desire to get the weary business of Parliament finished and done with. Accordingly, these votes passed much more easily than recent experience would have led one to anticipate. The only serious point of attack was a proposal to allow £200 to Sheriff Ivory for the expenses of defending an action for slander. This item was allowed to stand over for another year, and we trust it will never be heard of again. A generous master may pay the fees of the doctor who attends his servant. But it is not usual, even for generous private individuals, to bear the losses incurred by more well-to-do employés in matters outside the scope of their employment. Still less have servants of corporations, and least of all servants of the State, a right to look for generosity when they meet with private misfortune. Another point of attack was the Lord Advocate's salary. It was said that this salary was excessive. As we pointed out the other day, the Lord Advocate's emoluments are very much less than those of the Attorneys-General for England and Ireland. We do not think the Lord Advocate's salary too high, but, even if it were so, we think that every patriotic Scottish member should strenuously oppose any proposal to reduce it, unless coupled with a proposal to reduce the salaries of the English and Irish law officers. Mr. Caldwell complained bitterly of the presence of the law officers in Parliament. In that gentleman's opinion the business of Parliament would be much better carried on in the absence of law officers. We are not surprised that he thinks so. The presence of the law officers in Parliament is the best safeguard against the passing into law of the crude, tinkering, and often preposterous Bills of amateur legislators like Dr. Cameron and Mr. Caldwell.



Thomas Moroney.—With the political aspects of this case we have no concern. Its legal merits have been much misunderstood. Moroney adopted the Plan of Campaign. It is well known the bankruptcy laws in Ireland apply only to persons engaged in trade, but Moroney, besides being a farmer, was also a trader. Accordingly, his landlord took

bankruptcy proceedings against him. In the course of these proceedings Moroney was brought up for examination, with the view of ascertaining from him in what way he had disposed of the proceeds of the sale of a number of cattle. Moroney refused to take the oath or to be examined, in defiance of the provisions of the Act of Parliament, which required him to submit himself to examination. In these circumstances Judge Boyd had no alternative but to commit Moroney for contempt of Court; and committed accordingly he was, until the contempt should be purged. In the end, after some two years' confinement, Moroney was liberated in respect his landlord did not insist further upon his right to have him examined on oath in the bankruptcy proceedings. Latterly it has been represented, both by the Government and by Judge Boyd, that Moroney was imprisoned, not for contempt of Court, but for disobedience to an Act of Parliament. We disagree with this view. Moroney was imprisoned for disobedience, or contempt of Court, in refusing to obey an order made in terms of an Act of Parliament. Disobedience to an Act of Parliament may be punished by such sanctions as the Act has imposed, but certainly not by summary commitments for an indefinite term. The other day certain fishermen were interdicted from fishing in close time in the Tay. If the fishermen fish in the Tay, they may be prosecuted criminally under the statute, or proceeded against for breach of interdict. If the former remedy be sought, the punishment will be for "disobedience to the statute;" if the latter, for "disobedience to the Court." Moroney's commitment was of the latter character. To take another illustration. Suppose a man is required by statute to pave a portion of the street, and he refuses to do so, an order from Court is obtained against him. He still refuses to comply, and is committed. This man's commitment is surely for disobedience or contempt of Court, and not for failure to comply with an Act of Parliament. In another respect we think the Government were wrongly advised as to the law. They said that they had no power to release Moroney. Surely this was nonsense. Surely nobody can be kept in prison in defiance of the orders of the head of the Executive, or the Crown. The gaoler is the servant of the Lord Lieutenant, and surely

the gaoler would have been bound to open the prison door if the Lord Lieutenant had been so ill-advised as to order him to do so. A great deal of outcry was raised against the indefinite term of Moroney's commitment, but to every lawyer it must be obvious that it would never do to give a man who defies the Court a short definite sentence, which it might be well worth his while to prefer to compliance, and at the end of which he might walk out as defiant as ever. There are plenty recent precedents in Scotland for the course taken by Judge Boyd. Besides a bankruptcy case in Aberdeen which has been cited in the press and in Parliament, there was the case of the Rev. Peter Leys, who was committed indefinitely for refusing to deliver up his grand-children to their father; and eighteen months ago an Argyleshire farmer was committed in the same way for breach of interdict in persisting in a trespass, and refusing to undertake to desist. In the former case the prisoner was released at the instance of the complainer, very much as has happened in Moroney's case, whilst in the latter case the contempt was purged by submission after a few weeks' incarceration.

* * *

The British Guiana Contempt Case.—This case, which we noticed last month, has been brought before the Privy Council by appeal. Mr. De Souza, a coloured barrister, was, it will be remembered, sentenced to be fined 500 dollars, and to be imprisoned for six months. The contempt consisted in the publication of certain newspaper articles reflecting upon the decisions of the Court. The Judicial Committee were moved the other day for leave to appeal. After argument the leave was granted, but the Committee were of opinion that they had no power to deal with the question of interim liberation, upon which matter any application must be made, not to the judicial, but to the executive advisers of Her Majesty.

* * *

Conveyancing and the Crofters Act.—The Sheriff of Orkney and Sheriff-Substitute Armour have decided a case which illustrates the awkward result to conveyancers of the intro-

duction of a new form of tenure based upon a contract, the particulars of which are embodied in no written instrument. A croft was sold by bondholders under their powers of sale. The proprietor, however, refused to cede possession, on the ground that he had let the holding to his son, and that the latter was therefore a crofter entitled to fixity of tenure. After a proof the Sheriffs held that the lease between father and son had not been made out, and accordingly they decerned in the removing. The facts might, however, have disclosed a *bona fide* contract, and the case is therefore an illustration of a new terror to conveyancers and purchasers of Highland property. The purchaser can always examine the lease of an ordinary tenant; but in the case of crofting property, the rights of crofters in it, and accordingly its value, can be ascertained from no written instrument, and require a delicate inquiry into facts and circumstances.

Special Articles.

THE SYSTEM OF EXTRAJUDICIAL EXPENSES.

THERE is a popular notion abroad that if a man owes one £50, one is entitled to receive that sum in full. But according to all auditors and taxing masters this is a doctrine which cannot be accepted without a very important qualification. So long as payment is made readily and willingly, the creditor is entitled to his full £50. But if it be otherwise, if the debtor refuses to make payment upon any ground however frivolous, and payment is enforced only by recourse to a Court of law, then the creditor is not entitled to his £50, he must be content to take something less. It may be £40 or £30, or it may even sometimes, if the litigation be protracted, be nothing at all. John Brown and William Smith instruct me to buy certain stocks for them. They each lose £50. John Brown pays me his fifty like a man. William Smith refuses to pay a penny, and avers that he never authorized the transaction—a gross falsehood. I am obliged to raise an action against him to recover the money. I succeed in my

contention, I convict Smith of falsehood, I obtain decree against him, and I leave the Court with £25 in my pocket. My good old grandfather leaves me £500 free of legacy duty. My cousin Peter disputes the will, on the plea of alleged testamentary incapacity. The challenge is groundless, and the will is sustained; but instead of the £500 the old man meant me to have, owing to Peter's action I take only £400 by his bounty. Through the carelessness of a railway pointsman, I lose my right hand. A jury of my countrymen assess upon oath the value to me of my right hand at £800. When accounts are squared, I find that for the loss which the jury affirmed it would take £800 to cover, I am only £600 in pocket. It is a mistake then to suppose that, as justice is administered in this country, a creditor who is obliged to have recourse to the law Courts is likely to see the full amount of his money. In truth he never does so. The amount of deduction may vary, it may be 5 per cent. or 50 per cent., but there is always something off. A suit which left the creditor at the close with the full amount of the debt in his pocket, would be as great a rarity as a solicitor who never rendered an account. We need hardly say that we do not refer to the fact that the loser in a litigation is often unable to pay the costs of the suit awarded to his antagonist. That is just the luck of life, and has to be borne. But that, though common, is not the general case. The rule holds good in all cases, even where the debtor is a man of abounding riches, the creditor does not recover the full amount of his debt by civil process. No doubt the debtor, if the case goes against him, pays the debt in full. No doubt, too, the solicitor of the creditor receives payment of the full amount of the debt and a sum for costs besides. But the latter goes entirely to meet his own account, and, after all has been done, there still remains a balance of that account not recovered from the other side. This balance has to be met by the application in payment of it of part of the amount recovered, and so it happens that before the creditor's hand touches the money it has undergone a more or less serious deduction. It is this deduction, then, that is the key to the situation, and it is this deduction which is familiar to every practitioner as "extrajudicial costs." In every suit these

costs are present. There is no escaping them. There are recorded instances, no doubt, in which the auditor has passed accounts without any deduction; but in these cases it may be taken for granted that the account as presented to the auditor did not correspond with the account as stated against the client in his solicitor's books. The latter contained a number of entries which were not in the former. The account presented to the auditor was specially stated with a view to taxation, and with a regard to the practice and the whims of the auditor.

This is a subject of great importance to the legal profession, for there is nothing which does more to bring lawyers into evil repute, nothing which causes more heart-burning between clients and solicitors, than this matter of extrajudicial expenses. When a man obtains a verdict of £500, he naturally expects to find himself £500 in pocket; he cannot understand why the solicitor who has conducted his cause to a successful issue should send him a cheque for only £400. "Expenses! what have I to do with that? Wasn't the defender found liable in expenses? Why didn't you send in your account to him?" And when the mysteries of taxation are explained to him, matters are not made any better. "Well, is not the auditor there to say what is a proper charge, and if he says so much is a proper charge, why do you ask more from me? If in trade or business there is an independent man of skill to put a value upon work done, his decision is final. Why should the price be more to one man than to another? The proper charge of the work cannot depend in any way upon whether it is to be paid by A. or by B."

It is impossible not to recognise the plausibility of this reasoning, and although the lawyer knows that there is an answer which quite clears himself, if not the system, it is no wonder that it is often hard to make the indignant client take this in. We have often heard even educated and intelligent men, who had been successful in suits, and bitterly disappointed when their accounts were rendered, express themselves in very strong terms upon the conduct of their solicitors. Even the unsuccessful litigant, to whose benefit the system operates, sometimes holds up hands of holy scorn at the

iniquity of solicitors. The other day we heard a tradesman who had lost a small case, but had succeeded in getting some £30 taxed off his adversaries' account, exclaim—"Lawyers, indeed! What would be thought of the likes of me if I was to send in an account overcharged 40 per cent.?"

Attention was called to this matter in our columns a few years ago. Some of our readers may remember "The Story of a Successful Litigation," a narrative in which a "successful" litigant relates his woes, and explains how he has been all but ruined by the extrajudicial expenses in a successful litigation against an utterly unfounded claim. This tale was followed by an article upon the subject in our number for January 1884, which will bear reperusal, and the discussion was further continued in an interesting letter by a correspondent, "Simplex," in our issue of the following month. The anomalous character of the rule which recognises two entirely different systems of taxation, according as an account is taxed between party and party or between agent and client, is clearly pointed out in our former article upon the subject.

"It is certainly not very easy for the uninitiated to understand the foundation of these distinctions. If I employ a law agent to conduct a litigation upon my behalf, and if after the conclusion of the litigation he presents an account the charges in which are in excess of what was fairly necessary to conduct the case, then it is clear either that my lawyer has misconducted the case or else that he has overcharged me. On the other hand, if, after a successful and well-conducted litigation, I am found entitled to receive from the other party less than what was fairly necessary to conduct the case, then it is clear that through the system of taxation adopted I have been defrauded of that to which I was justly entitled. Yet this is what happens every day. The same auditor will tax the same account on entirely different principles, and bring out an entirely different result, according as the expenses are to be recovered from a third party, who, be it observed, is in the eye of the law a wrong-doer, or to be paid by the client to his own law agent."

It need scarcely be said that whatever be the principle upon which the auditor works, the result is always to bring

out a larger amount when the account has to be paid by the client to his own lawyer, than when it has to be paid by the unsuccessful litigant. Were this journal addressed to a lay instead of a legal audience, appreciation of this fact might not so readily be taken for granted. To the lay mind it might appear that where, through the bankruptcy of the unsuccessful litigant, or for some other cause, the burden of expense is to be borne by the lawyer's own unhappy client, the lawyer ought to be content with something less than what he might reasonably look for when the expenses are to come off an antagonist who has been proved to be utterly in the wrong. The lawyer, however, knows that it is otherwise, and that he may calculate upon a taxation between party and party bringing out from 20 to, it may be, 50 per cent. less than a taxation between agent and client. Were a bundle of accounts taxed upon both systems to be handed to any one uninitiated into the mysteries of taxation, with a request that he would compare the two systems, this fact would at once be brought home to him on examination of the accounts, that taxation between party and party always takes off more than does taxation between agent and client. But beyond this fact it would be quite impossible for him, however careful might be his study of the documents, to discover any principle in accordance with which certain items were allowed under the one system and disallowed under the other. But although no such principle is discoverable from the accounts themselves, in the mind of the auditor there is no doubt a principle in view, to which he seeks to give effect, and that principle has thus been explained by the present auditor of the Court of Session himself, if we mistake not, viz. "As between party and party—to allow only those charges the incurring of which is necessary to the conduct of the case; as between agent and client—to allow, except under very exceptional circumstances, all outlays and all reasonable charges for work honestly done." The test, then, in the one case, is to be the *necessity*, in the other, the *honesty* of the work. Now we are not sure that, in a question between agent and client, the *honesty* of the work is quite a fair test. In other callings a man's honesty does not entitle him to remuneration for blundered work. A

contractor who builds a wall off the plumb, and is obliged to take down his work and rebuild, is not entitled to be paid for building the wall twice, however honestly his work may have been done. So it does not seem to us by any means clear that an agent who, by want of proper skill or judgment, has done unnecessary work in the best of faith, is entitled to be remunerated for it. But we are not concerned to push this inquiry further for the present. We will turn rather to the other side of the picture, and consider the principle which, in the opinion of the auditor, is applicable in the case of taxation between party and party. Here the auditor allows "only those charges the incurring of which is necessary to the conduct of the case." Now it is clear that the words "necessary to the conduct of the case" must not be construed as meaning "absolutely necessary to get the case through the Court." It is not absolutely necessary to have two counsel even in a heavy proof. Yet the auditor allows two. It is not absolutely necessary to precognosce the material witnesses beforehand, yet the auditor allows the cost of such precognition. "Necessary to the conduct of the case" must therefore be read with some qualification even by the auditor. What that qualification is in his mind, we do not pretend to know. We should have thought the reasonable qualification was to be found by inserting the word "prudent," and making the rule read: "necessary to the prudent conduct of the case." If this were the rule, we should have no fault to find with it; but all the actings of the auditor belie the notion that this is the principle upon which he acts, or, if he does attempt to act upon it, his notions of what is necessary for the conduct of a case differ materially from those of every other practitioner who ever had a case to conduct. In every account taxed by the auditor, charges are disallowed for work or outlay which no reasonable man would have dispensed with. It is, for example, his rule to disallow the charge of the agent in charge of the case for precognoscing witnesses, and to allow only the charge which would have been incurred by the agent resident nearest to the place where the witnesses are to be found. Now, as everybody knows, a proof very often turns upon the way in which precognitions have been taken, and many a good case has been lost through carelessly

prepared precognitions. Again, it is often of great importance in determining which witnesses ought to be brought and which left at home, to know something of the demeanour of the witnesses and their manner of telling their stories. No prudent agent in a case of any importance would dream of entrusting the delicate duty of precognosing the witnesses to a local agent ignorant of the history and with only a vague general idea of the merits of a cause, and probably unfamiliar with the practice of the Court where the case is to be tried. The services of the agent conducting the cause are certainly "necessary to the prudent conduct of the case," yet the auditor disallows his charge for these services, although, by an inconsistency which just shows the absurdity of his whole methods, he sometimes allows the travelling expenses incurred by the agent whilst engaged in this work. If it is unreasonable that the unsuccessful litigant should pay for the *services* of any agent other than the one resident on the spot, why should he have to pay the travelling expenses of another agent who has come 150 miles to do the work? And if it is fair that he should have to bear these travelling expenses, why should he not equally bear the charge for the services of the agent who made the journey?

Again, with regard to counsel's fees, and the fees of skilled witnesses as well, it is notorious that the auditor never allows the whole amount sent in heavy cases. So well is this understood, that in preparing his account for taxation an agent never dreams of making the fees for proof as actually sent to counsel the test of what he will state in his account. The question rather is, What is the highest amount which there is any probability of the auditor passing? Now it may be that counsel ask too much for their work, although perhaps, like other people, they are entitled to get the most that their work will bring. But nobody has made the auditor a public censor in this matter, and in acting as a censor he is arrogating a position never intended for him. The question for him is not what in the abstract a counsel's fee ought to be for a certain piece of work, but what is the fee for which, in actual practice, the services of a counsel of experience and ability, proportionate to the magnitude and the difficulty of the cause, can be obtained. It may be said that if

the auditor always, except under exceptional circumstances, allowed the fees actually sent to counsel, agents would be encouraged to send exorbitant fees, which it would be a great injustice to the losing party to be called upon to pay. Against exorbitant fees, however, there is always the safeguard that no agent is so cocksure of winning his case as not to contemplate the possibility of the fees sent by him having to come out of his own client's pocket. But the conclusive answer to any argument founded upon this supposed deterrent effect of the auditor's censorship is, that, as regards fees sent in actual practice, it has no operation. In sending fees no agent considers what the auditor will pass. He would be a fool and act most unwisely in his client's interest if he did. The question to which he addresses his mind is, For how much can the best forensic assistance be obtained? The answer to this question always shows a higher figure than by any chance the auditor will allow. The only result of this self-assumed sumptuary jurisdiction of the auditor is, not to reduce the amounts of fees sent, but to secure that a great deal of expense, which ought in all fairness to fall upon the unsuccessful litigant, the wrong-doer, has to come out of the pocket of the party whom the Court have found to be in the right.

The defence is sometimes urged by the auditor that in taking the course, he is really consulting the interests of the the profession. "Make litigation cheap, and you'll have plenty of it." But to this contention the conclusive answer is, that the action of the auditor has no influence whatsoever in cheapening litigation; its only effect being to shift some of the incidence of expense on to the wrong shoulders. Further, the increase or diminution of litigation is a matter with which the auditor has nothing to do. He holds his appointment not to give effect to any opinions he may hold upon that or any other question, but to do even-handed justice between man and man; and there is a strong feeling in the profession that he has been so little successful in that task, that his office has become an instrument of grievous injustice to litigants.

Our correspondent "Simplex" puts forward a qualified defence of the present system, in the form of a plea that any remedy would be worse than the disease. It is desirable, he insisted, that expenses should be disposed of summarily. But

in order to tax an account fairly there must be either an exhaustive inquiry as to the necessity of every item incurred, or one must assume the honesty of the solicitor whose accounts are being taxed. When an account is being taxed as between agent and client, the honesty of the solicitor whom the client has himself chosen may be assumed against the client; but where the taxation is between party and party, no such assumption can be made in regard to the solicitor chosen by an adversary. There is something in this, no doubt, although the reasoning would be more satisfactory if it were only *sometimes* that taxation on the two systems showed a discrepancy. As every taxation, however, shows a considerable discrepancy, it would seem to follow either that all solicitors are dishonest, and only escape in questions with their clients because the clients are barred from pleading the solicitor's dishonesty, or else that it is quite impossible fairly to tax any solicitor's account without knowledge as to the honesty or the reverse of the solicitor. The remedy which our correspondent suggested was a somewhat startling one:—

“If a complete remedy cannot at present be devised, then a partial remedy would be better than none. Let me suggest for consideration whether this might not be done on the principle of making an allowance to the successful party for what are at present called extrajudicial expenses, to be calculated by a percentage of the judicial expenses to be taxed by the auditor or Court, according to the nature of the process, but guided by general rules to be laid down from statistics procured from the practice of agents of undoubted respectability. This would be following the present policy of the Court in avoiding altogether, rather than meeting and attempting to overcome in practice, the difficulty of taxation, while it would, on the other hand, free our Courts of justice from the reproach, so galling to litigants with just causes, of providing no remedy at all for an undoubted injustice. Modern experience of the extensive applicability of the rules of average insurance and estimate prove that no formidable difficulty need be expected in establishing rules fairly accurate; nor are respectable agents, with large and varied experience, so scarce that reliable statistics would be difficult to procure. Whatever opinions may be formed as to the degree of accuracy with which such

rules could be framed and practised, so as to meet the demands of justice in all cases, this much seems certain, that an additional allowance to the successful party of a percentage of judicial expenses, so small as to err rather on the small side, would approach nearer to complete justice than the present practice."

The foregoing seems a bold proposal, but something very much the same has been done in some recent cases where the Court have assessed the amount of damages, and where the assessment has been explained to include a certain sum towards the extrajudicial expenses of the pursuer. We doubt, however, if the system would prove acceptable or satisfactory to litigants, and indeed it seems almost to reduce taxation to an absurdity altogether. If a slump sum, ascertained by a computation of averages, is to be added to the taxed costs, why not abolish taxation altogether, and arrange the whole matter of costs in a calculation of averages, having regard to the nature of the cause and the magnitude of the amount at stake.

We are far from saying that any complete remedy can be found consistent with the maintenance of the principle that accounts should be taxed summarily, and that there should not be a fresh litigation over the matter. But if the evil cannot be completely remedied, it certainly admits of very great diminution. Seeing that a hardship does undoubtedly exist, it ought, in our view, to be the aim of the auditor to reduce that hardship to a minimum, to secure to the successful litigant, in so far as possible, reimbursement for all *bona fide* expense to which he has been put. Our complaint is that the policy has been quite the reverse, and that the endeavour has been to cut down to the lowest the amount recoverable from the unsuccessful litigant. There are many particulars, to some of which we have above referred, in which the rules of taxation that at present obtain are contrary to all common-sense, and a travesty upon justice. There could be no difficulty in making an immense reform, in regard to these particulars, at all events. The matter is one in which the profession are deeply interested, and we shall be glad if the foregoing pages call forth expressions of opinion on the matter from any of those who have had wide experience of the injustice and impolicy of the present system.

*THE POSITION OF THE SHERIFF IN CRIMINAL
PROCEDURE IN SCOTLAND.*

WE propose in this paper to offer some criticisms on the present position of the Sheriff in Criminal Procedure, and to make some suggestions as to an alteration on that position which we think would be attended with advantage.

We use the term Sheriff as embracing Sheriff-Substitute; and although our remarks are applicable to the Sheriff-Principal, they have a more especial practical bearing on his Substitute as his resident representative in matters criminal.

We expressly disclaim any intention of reflecting in the slightest degree on the Sheriffs of Scotland, a body of men of whom any country might well be proud, and who perform the important duties entrusted to them in a manner beyond all praise. We believe, however, that many, if not all, of these gentlemen would gladly be relieved of the duties in connection with criminal procedure, afterwards referred to, the performance of which has, we think, been rendered both unnecessary and inexpedient by the altered state of the times.

What, then, is the position of the Sheriff in criminal procedure in Scotland?

His position is a combination of—(1) executive and (2) judicial functions.

Let us first glance at the latter as being those in which he comes most prominently before the public.

The Sheriff presides as sole judge in his Summary Court, while in his Jury Court he directs the jury as to the law, and assists them in the ascertainment of the facts. In both Courts he has, at common law and by statute, extensive powers of imprisonment. His jurisdiction as regards the crimes competent for trial in his Court, which was always extensive, has been materially extended by the recent Criminal Procedure Act of 1887; and crimes, which from their serious nature had formerly been privative to the High Court, have been made competent in the Sheriff Court.

The question then naturally arises,—Is there a tendency in the executive functions of the Sheriff to conflict with his judicial functions? To arrive at a solution of this question,

we must consider in what these executive functions consist, and must also glance at their practical operation. Leaving out of account his duties as guardian of the public peace, which at the present day are happily not onerous, the main executive function of the Sheriff may be described as that of Director of Public Prosecutions within his bounds. At first sight this title would appear more appropriate to the Procurator-Fiscal, who is no doubt practically the public prosecutor within his district; but it must be remembered that, notwithstanding recent changes in procedure, the Procurator-Fiscal is still the officer of the Sheriff, and the latter is responsible for the preliminary steps of a prosecution. A concrete example is probably the simplest and clearest way of seeing the practical working of the present system. Let us then assume that a case of considerable delicacy and difficulty arises. The Sheriff's warrant to arrest is the first step in the procedure; and before presenting an application for this purpose, the Procurator-Fiscal, in order to keep himself free from responsibility, very probably consults the Sheriff as to the advisability of a prosecution. Assuming that a warrant is issued, the accused appears before the Sheriff for examination on declaration, and if not liberated on bail, is committed to prison on the Sheriff's warrant. The Procurator-Fiscal then commences a precognition. This again is done under warrant of the Sheriff, and, indeed, in former times the precognition was frequently taken in his presence. Although this practice is now, unless in exceptional cases, obsolete, it is still the duty of the Sheriff, in a case at least of difficulty such as we suppose, to read the precognition when taken, and to consider whether the evidence justifies a committal for trial. Assuming now that the case goes to trial, and comes before the Sheriff before whom it has already been in these preliminary stages, is he in quite as favourable a position to preside at the trial as if the case then came before him for the first time?

In order to arrive at a satisfactory answer to this question, it is necessary to look a little more closely at the effect which these different stages of procedure are calculated to produce on the mind of the Sheriff. These steps are open to the objection, that from the outset they tend to make the

Sheriff familiar with an *ex parte* view of the case. It is seldom that at first the Procurator-Fiscal is in possession of all the facts of a case, and he may be in possession of facts incompetent as evidence, the effect of which, if brought under the notice of the Sheriff, it is not easy for him afterwards to dismiss from his mind. The appearance of a prisoner at declaration is also calculated to produce an impression either favourable or more probably unfavourable on the mind of the Sheriff. As regards the perusal of the precognition prior to trial, we cannot help thinking that it is difficult for the Sheriff to do so without forming some opinion as to the guilt or the reverse of the accused. Yet it must be remembered that this precognition, however carefully taken, is to a certain extent *ex parte*. It is not taken on oath or subjected to the test of cross-examination by the accused's agent, and it probably does not embrace all the evidence available for the defence.

No doubt there are minds so constituted as to be able entirely to brush aside all previous impressions of a case, and to deal with it when it finally comes before them as if it were then presented only for the first time; but we are inclined to think that with many, if not indeed with the majority, first impressions have a tendency, even insensibly, to influence the judgment either on one side or the other, and in the circumstances this influence is more likely to be towards the case for the prosecution.

Various objections may probably be made to the case against the present system which we have ventured to state, and it is only right when an institution of old standing is being placed on its trial that such objections should be fairly met.

It may be said—(1) That the distinction of executive and judicial, which we have drawn between the different duties of the Sheriff, is imaginary, and that in point of fact he is acting in his judicial capacity from the outset to the conclusion of a case.—To enable us to judge of this objection, let us take the analogy of a civil case. Suppose the Sheriff was to be consulted by the solicitor for the pursuer prior to any action being raised, and a precognition in support of the pursuer's case submitted to him, would the defender have perfect confidence in the decision afterwards given by that Sheriff? Yet the one case may only involve a few pounds,

the other the liberty and it may be the reputation of the subject. (2) That the case stated is exceptional, and that, although theoretically the Sheriff is director of prosecutions within his bounds, this position is practically occupied by the Procurator-Fiscal, and that the granting of the warrants to which reference has been made is a pure matter of form. —Even conceding all this, it does not affect our contention. It is precisely in cases of exceptional difficulty, in which the evidence may be very equally balanced, that the force of our argument is, we think, seen. (3) That there have been no complaints of any injustice under the present system, and that this system has worked well in the past.—This is the invariable answer in certain quarters to any suggestions for reform, and is not, we think, entitled to much weight. If it is the case that there have been no complaints, and that the present system has worked well in the past, we think this reflects the utmost credit on those who have administered the system, but is not a ground for its retention if a better can be suggested. Those who desire to see the operation of such a system in districts where the fierce light of public opinion does not shine so brightly as in our favoured country, should read the report of the appeal before the Judicial Committee of the Privy Council, in the case of *Dillet*, March 10th and 19th, 1887 (Cox, vol. xvi. part 4, p. 241), in which the charge to the jury in a case of perjury against *Dillet*, by the Chief-Justice of British Honduras, was brought under review. After doing so, they will, we think, concur with the opinion of Lord Watson, when he says, "It is very unfortunate that, owing to the fact of there being but one member of the Supreme Court of British Honduras, the trial took place before the same judge who had directed the affidavits to be prepared and submitted to him, had appointed the appellant to answer them, and, upon the affidavits and answer being made, had directed the prosecution." Baron Hume, in his chapter on "Arrest and Precognition," appears to recognise the principle for which we have been contending. At p. 83 of vol. ii., in referring to the former practice of taking precognitions before the supreme judges who were afterwards to preside at the trial, he says, "Certainly, in every point of view, it is better and more suitable that the judges,

like the assize, should enter on the trial without any previous knowledge or impression of the case; and it is now a long time since there was any room for a complaint in that respect." The learned writer, however, appears to have overlooked the fact that the same principle applies to a Sheriff presiding at a trial, the precognition in which had previously been submitted to him.

In former times, owing to the unsettled state of the country, and the absence of the facilities for communication which now exist, it may have been necessary for the Sheriff to take an active part in the earlier stages of a prosecution; but it can hardly be contended that this is now the case; and if our objections to the present system are well founded, we think the time has come when the Sheriff should be relieved of the onus which the present system throws upon him, and his duties in criminal cases confined to his judicial functions proper. The change by which this can, we think, be carried out is a very simple one. It consists in the proper allocation of the duties of two officials—the Procurator-Fiscal and the Sheriff. Let the Procurator-Fiscal undertake the entire responsibility and management of all executive proceedings, and the Sheriff confine himself to what is really his true position, that of a judge. All preliminary procedure might take place on the warrant of Justices of the Peace, or, as we think would be better, on the warrant of the Procurator-Fiscal himself, as being the real motive power in the prosecution. We think it is for consideration whether the present system of declaration should not give place to an examination of the accused in open Court, but optional to himself. If it is thought desirable to retain the declaration, it might be taken in presence of the Procurator-Fiscal, the accused's agent being also present; and it should be strictly limited to a voluntary statement, without any examination. The accused's agent should, we think, also be entitled to be present at the precognition, or, at all events, should be entitled to take a copy of the precognition when completed.

As we stated at the outset, we have offered these suggestions not as reflecting on the present administration of the criminal law, but in the hope that it may lead to the subject receiving the consideration which we think it deserves, and to an amendment in the direction indicated.

*THE RECENT JUDICIAL DEPARTURE IN
INSANITY CASES.*

WE have been favoured with the advance proof-sheets of a long and elaborate article on the above subject by Mr. Clark Bell, President of the Medico-Legal Society of New York. The new judicial departure referred to is to be found in the charges of the American judges in two cases, of which Mr. Bell's paper contains very full reports. The first is the case of Nancy I. Parsons and Joe Parsons, tried in the State of Alabama for murder; and the second is the case of John Daley, tried in the district of Columbia, for the same offence. Mr. Bell says:—"I submit the opinion of the Supreme Court of last resort in Alabama, as furnished me by Judge H. M. Somerville, a member of the Medico-Legal Society, regarding it, as I do, as the most able and scholarly recent review of the question, without remark, except to say that the decision of this case repudiates the rule in the *M'Naghten* case in Alabama, where hitherto it had obtained, and adds that State to the list of American States where it no longer is followed." The charge of the judge (Montgomery) in Daley's case is to a similar effect.

The change alluded to, however, has been gradual. It is "the long result" of constant attention to this important subject, necessitated by the frequent occurrence of the question of insanity in criminal investigations. The remarks of the learned judges in Alabama and Columbia put the criteria of lunacy clearly; but, as Mr. Clark Bell indicates, these criteria are not now judicially explained for the first time. He leads up to these two instructive cases by a *resumé* of the progress slowly made in the legal views of insanity. The path has been trodden many times by nearly every writer on medical psychology; but there are many original features in this paper of Mr. Bell. "By the ancient law of England," he reminds us, "*madness* was not a defence in an indictment for murder. If it appeared on trial that an accused was mad, there was such a special verdict, on which the Crown could pardon. In the most notable cases of last century (Arnold, Ferris, Hadfield) these questions came up for discussion, and

Lord Erskine's speech in defence of Hadfield, who was undoubtedly a lunatic, and in a state of furious mania, was then regarded as a masterly innovation upon the existing state of the English law (27 St. Tr. 1281-1800). Up to the beginning of the present century there was no authoritative decision of the High Courts of England upon this question, and our only reported cases are those of the simple *dicta* of a single trial judge, in important criminal trials, as they came down to us in the reported State trials of the eighteenth century. Sir James Fitz-James Stephen, by far the ablest writer upon the criminal law of England, in reviewing it historically, writing as late as his treatise on the History of the Criminal Law of England (1883), says:—"I know of no single instance in which the Court for Crown Cases reserved, or any other Court, sitting *in banco*, has delivered a considered written judgment on the relation of insanity to criminal responsibility, though there are several of such decisions as to the effect of insanity on the validity of contracts and wills."

Mr. Clark Bell then proceeds to comment on the answers given by the judges in connection with the *M'Naghten* case, to which he considers the present state of the law of England on this point to be due. *M'Naghten*, it will be remembered, was tried for shooting Mr. Drummond in 1843, mistaking him for Sir Robert Peel. He was acquitted, and the House of Lords submitted to the judges a series of questions on the subject of the law of criminal responsibility. The answers returned by the judges have been greatly relied on in judicial charges ever since. After quoting these, Mr. Bell confines himself to the following remarks on them:—"1. They were not the decision of any Court of criminal jurisdiction, based upon evidence taken in a judicial proceeding. 2. They are, as Sir James Stephen has so well stated, 'mere answers to questions which the judges were probably under no obligation to answer, and to which the House of Lords had probably no right to require an answer, as they did not arise out of any matter judicially before the House' (*ib.* vol. ii. p. 154). 3. The most that could be legally claimed for these answers, as to their legal binding force and effect, would be that they were the individual opinions of fourteen out of fifteen of the

then English judges on answers to hypothetical questions, not in a judicial proceeding, and in a strictly legal and judicial sense mere *obiter dicta*. A critical examination of these questions and answers will show that the construction since given to them by English judges in criminal trials, has lent them a significance, force, and, I might say, construction, not covered by the terms of the questions and answers themselves, because the answers are so closely confined to the narrow scope of the questions, as to leave many cases outside them which might unthinkingly be supposed to be included in and covered by them. Whatever may be thought or said of these questions and answers, or of the course of the English judiciary in accepting these *dicta* of the judges as a statement of the law, it is a fact that from 1843 to a very recent date it has been usual for the English trial judges to charge the jury in cases where the defence of insanity was interposed, as to the question of responsibility: That it must be clearly proved *that at the time of the committing of the act the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.*" After alluding to the ambiguity of the words "wrong" and "know," and quoting Sir James Stephen thereon, and after pointing out that the practice of the English judges has been followed in many of the American States (notably in New York, Pennsylvania, Massachusetts, Michigan, Alabama, and Ohio), the author reminds us that the medical profession of England at once put itself against the view and practice of the English judges, who thus made the test of responsibility to consist in the knowledge of right and wrong (Resolutions of the British Associations of Medical Superintendents, July 14, 1844). On both sides of the Atlantic, too, legal and medical writers alike (with but few exceptions) denounce this test, and "hold it to be inconsistent with the progress of science, the civilisation of the age, and contrary to the well-known experience of mankind."

There is one eminent English authority, however, who not only defends the test, but justifies it on principle, and "advances what he insists are strong logical reasons why the insane should be punished, even with greater severity than

the sane, for violations of law." This is Baron Bramwell. Mr. Clark Bell proceeds to consider his lordship's views, as set forth in the article "Insanity and Crime" in the *Nineteenth Century* for December 1885. He prefaces this with these well-warranted remarks: "The discussion of this subject has been unfortunately embittered, distracted, and, I feel sure, a reasonable solution delayed, by the intemperate language used by medical writers in criticising the *dicta* of judges and the opinion of eminent lawyers, especially in Great Britain. These assaults, so far as I have been able to find on a careful examination, have usually been the result of misconceptions in the medical mind. Objects sometimes seem to take on a colour from the lens through which we regard them, that they do not in fact have. The mountain is not really blue or green; it is the glass of our spectacles that produce what seems to be a natural, but what is in fact a false effect. I doubt if Baron Bramwell would have written his article in the *Nineteenth Century* magazine except on provocation given by medical writers, following such scathing denunciations as that with which Dr. Henry Maudsly assailed the English Bench in his 'Responsibility in Mental Disease,' and like criticisms. Sir James Stephen well says, 'Sarcasm and ridicule are out of place on the Bench, in almost all conceivable cases,' when commenting on quite as intemperate language from judges on the Bench, concerning medical expert witnesses. Let us hope that the era of temper and passion has passed, and that we can now in both professions, law and medicine, discuss this important issue without passion, prejudice, or violent language."

Mr. Clark Bell then proceeds:—"The test proposed by Baron Bramwell is, '*That the law should punish all whom it threatens on conviction. That it ought to punish all who would be influenced by the threat, all whom it would or might deter, or help to deter; that the question should be, not whether the person accused of crime is mad, but whether he understood the law's threat.*' This sounds specious, but is not the law of England now, nor was it ever. The law threatened M'Naghten, yet he was acquitted, because his delusion dominated his will in the opinion of the jury. 'He could not help it.' The law did not, and could not, deter him. The law threatened Hadfield. He knew well the nature and character of the act.

He well knew it was high treason. He knew this was a crime punishable under the English law with death, and his object was that he might be put to death to save the world. By Baron Bramwell's test, Hadfield should have been convicted, and he so asserts in his paper. But his delusion evidently dominated his will power. He could have committed suicide, and attained his end, but desired rather that his life should be taken by others, through the channel of punishment for crime. Lord Kenyon stopped the prosecution before Erskine had called half his witnesses for the defence. Why? The law did threaten Hadfield. Baron Bramwell considers that the law, instead of acting as a deterrent, actually was an inducement. It assisted him in his delusion, and furnished him with the means of the accomplishment of his insane purpose. I assume, as a lawyer, that Baron Bramwell would consider that the act of Lord Kenyon, the trial judge, in stopping the prosecution and dismissing the case, was a judicial decision of an English Court of competent jurisdiction, which judicially established as the law of that case, that Hadfield's act was *not* a violation of English law. That decision of Lord Kenyon has not been reversed, overruled, or set aside by any English Court of competent jurisdiction, and it is English law to-day, higher than the opinion of any judge off the Bench upon an abstract question in a polemical controversy, even if it were the Lord Chief-Justice. Baron Bramwell may differ in opinion with Lord Kenyon. He may think the latter's decision was erroneous; but how can he claim that the decision is not an authority as English law till overruled or set aside?

"Baron Bramwell's proposed test is both novel and *new*. It is not a safe test in many respects:—1. He would exempt all who do not understand the law's threat. Ignorance of the law has ever been held to be no defence for crime. One who really did not know of the law he was violating, should he be excused? 2. All who would be in any degree influenced by the law's threat, or whom it would or might deter. (a) Do not threats of personal harm oftentimes deter the insane from acts not necessarily wrong, but which influence their conduct? (b) Are not the insane influenced by threats of punishment, by mechanical restraints, solitary confinement, placing in

undesirable wards, etc. ? (c) Baron Bramwell claims that because the insane in asylums can be influenced by threats in the control of their conduct, or by what may be called asylum discipline, that they are under the law's threat, and therefore responsible. I concede that they are constantly so influenced, but where does this lead to ? Not necessarily to responsibility. Would Baron Bramwell say that, under the law of England, an incurable lunatic, an inmate of an asylum, should be hung for the homicide of a keeper, physician, or even another inmate ? Has such a thing happened ? Can it occur ? Yet the law threatens him. He knows right from wrong, and knows he is doing wrong, and he is influenced by, and is under, the threat of the law, if Baron Bramwell is correct. It is a question of degree, this power of the will. A homicidal or suicidal lunatic, threatened with a strait-jacket by his keeper, or with hyoscyamus by a physician, might be able to abstain from a given line of forbidden conduct in an asylum, and yet be wholly unable to resist killing another, in the one case, or himself, in the other, if the watch upon him was intermitted an instant. (d) The ability to comprehend the law's threat must be considered in connection with, and in relation to, the will power of the lunatic to resist or overcome the impulse or delusion. Does the delusion dominate the will ?—Could he help it ? should be the question. Baron Bramwell, in the *Dove* case, whom he describes as 'undoubtedly of questionable sanity,' and in another as 'such a madman as Dove,' is reported to have himself suggested as a test, '*Could he help it ?*' a much better and safer one than that propounded in his paper, and nearer the true meaning of the English law.

"What are legal punishments for offences ? How instituted ? how justified ? Human society has always justifiably exercised the right of regulating human conduct, by laws enacted under regular forms for punishing offenders. The theory is, that majorities must rule. The protection of the rights of man involves and necessitates punishment for human wrongs. No one doubts the right of society to take a human life as penalty for murder. Society has the same right to execute an insane man as a sane. I speak in the sense of power or authority. The North American savage killed the insane on the theory that he was of no further use

to himself or the tribe. It is said that the Chinese kill the hopelessly insane. A homicidal lunatic at large is a popular danger. Society would be justified in passing laws to execute every insane person, or to place under restraint every insane member, if the requisite majority of the law-making power united in believing that the general welfare of the State would be thus benefited. It is common to say this doctrine is *barbarous*. It is, perhaps, barbarous for the law to hang a man—sometimes, bloody, hideous, ghastly. *It is still the law*. I quite agree with the Baron in what he says about the object of punishment: ‘The law does not punish for revenge, but for prevention.’ ‘Punishment is not threatened out of revenge or spite.’ Society could never justify itself in taking a human life in any retaliatory spirit, or in the slightest sense of vindictive reparation or expiation for crime. No writer has in our day claimed that. How far the insane person had the *actual power* to resist, was conscious of the nature of the act threatened by the law, and to some extent even influenced by it, would be a safer legal test than the one proposed by the Baron, who considers that under the latter most cases of offences by the acknowledged insane would be followed by conviction and punishment. There is not, but if there was there should be nothing in the law of England that would force us to such an attitude towards that unfortunate class, whom the Earl of Shaftesbury so well described as the most unfortunate, because the most friendless of the human race.

“All men who reflect or examine the insane, know that a very large per cent. of the inmates of insane hospitals, including all who have any glimmer of reason, often know right from wrong, the nature and degree of punishment for crimes, and yet no one would, in the nature of things, recognise such a test in case of homicides occurring among the inmates of asylums; nor do the judges pretend to do so, in either country, in that class of cases where the offences were committed in the institutions for the insane. The practical enforcement of such a test of responsibility for the insane as that stated in the answers of the English judges, was followed by the conviction in the American States of many confessedly insane persons, their frequent execution creating public

excitement and distrust of our criminal procedure in the popular mind. The whole path of judicial decisions during the last part of the present century is illustrated by rows of scaffolds,—a reproach upon our civilisation!—on which have perished the insane, convicted by juries under the direction of judges who made knowledge of right and wrong the test of criminal responsibility! The judiciary in some of the American States realizing the evil, commenced to grapple with the issue. In New Hampshire, Judge Doe wrote a masterly opinion of the Court, in *State v. Pike*, repudiating the rule of the *M'Naghten* case (49 N. H. 399, 50 N. H. 369). And similar decisions followed in Kentucky, *Kriel v. Com.* (5 Bush Ky. 362), *Smith v. Com.* (1 Duv. Ky. 224); in Virginia, *Dejarnette v. Com.* (75 Va. 876); in Mississippi, *Cunningham v. State* (56 Miss. 269); in Connecticut, *State v. Johnson* (40 Conn. 136), *Anderson v. State* (43 Conn. 514); in Iowa, *State v. M'Whorter* (46 Iowa, 88), *State v. Feltes* (35 Iowa, 68); in Illinois, *Hopp v. People* (31 Ill. 384); in Indiana, *Bradley v. State* (31 Ind. 492); in Texas, *Harris v. State* (18 Tex. Court of Appeals, 87); in Pennsylvania, *Coyle v. Com.* (100 Pa. 573); in Georgia, *Roberts v. State* (3 Ga. 310); in Massachusetts, *Com. v. Rogers* (7 Metc. 500). In England the conviction of men confessedly insane, under the charges of judges, insisting upon the right and wrong tests, and notably the latter cases of Goldstone and Cole, led to such excitement in the public mind, that the execution of the insane thus convicted was finally averted by a medical inquiry after sentence, under the authority of the Home Secretary, and the unfortunates were placed in Broadmoor Asylum for what are called insane criminals, during Her Majesty's pleasure.

"In America they were usually executed, as in cases of Guiteau, Dr. Beach, Taylor, and others in Pennsylvania, the executives sometimes not being willing to institute the necessary medical inquiry after conviction, though the law provided for it in nearly all cases. In New York, however, Governor Hill has always instituted the medical inquiry after conviction, if any doubt or question existed; though, in Pennsylvania, Governor Pattison refused such an application in the case of Beach, though strongly urged, and the

highest medical authority pronounced him insane, and probably wholly unconscious when committing the act. The President of the United States did not authorize such an inquiry in the case of Guiteau, which is a source of regret. The *post-mortem* demonstrated his insanity, which *post-mortems* frequently do not establish where insanity really exists. The writer heard Guiteau's address to the jury on the trial, in which he laughed, shed tears, sang, recited poetry, acting like an insane person, strongly indicating that he had lost will-power and was dominated by his delusion.

"A high medical authority states that in England these judicial scandals are now substantially averted, by an instruction given from the Home Office to Government Counsel, in the Criminal Courts, to institute an inquiry in every case where there is any reason to suspect insanity exists, or will be pleaded,—to be conducted by the judges before the trial, by the examination of leading and acknowledged competent medical experts,—and that, in consequence, we are not likely to see insane persons executed, except very rarely, in that country under the present law. But in our own country, in more than half the States, the right and wrong test is still in force, and the insane are constantly convicted, and often executed."

Correspondence.

SIGNATURE BY COUNSEL WITHOUT REVISION.

(To the Editor of the Journal of Jurisprudence.)

SIR,—A practice is creeping in of neglecting to instruct counsel either to draw or to revise Petitions, and of only sending the Petition for signature after the prints have been thrown off, and very often after the Petition has been boxed to the Court. This practice, I submit, ought to be firmly resisted. The matter is not one of the privileges of counsel, but of fair dealing with the profession and with the Court. Perhaps it is an antiquated abuse that the signature of counsel should be required at all; perhaps the revision by counsel is unneces-

sary: but be these things as they may, so long as the present system endures, counsel are responsible to the Court for all pleadings to which they put their name. Competition is so keen now-a-days, business so scanty, that it is difficult for a young counsel to take up the proper position in the matter, and to refuse to put his name to a Petition placed in his hands for signature after the prints have been thrown off. The matter is one in which young counsel may justly claim the support of their elder brethren. The position of a junior in the circumstances figured would be greatly strengthened, and he would be much less likely to fall into a weak compliance, if the Faculty of Advocates were to make a distinct *pronunciamento* upon the matter. I am satisfied that some such action is all that is necessary to check the practice; and I feel sure that many offices which have of late been guilty of this irregularity, have only to have their attention directed to the impropriety of the practice, by such an authoritative declaration, to induce them at once to abandon it.—I am, etc.

JUNIOR.

Appointments.

LORD TRAYNER has been appointed President of the Railway Commission, when that body sits in Scotland under the Act of this year; Mr. Justice Wills is to hold a similar position in England, and Lord-Justice Barry in Ireland. We cannot speak as to the other appointments, but we have no doubt that the Scottish one will give unqualified satisfaction. We need not point out that these appointments in no way alter the status of the learned judges as ordinary judges of the Supreme Courts.

THE SOLICITOR-GENERAL for Scotland has been made a Q.C. This is in accordance with recent practice, by which this dignity is conferred upon the law officers and the Dean of Faculty. It was only in 1868 that this practice was introduced, and the honour is never bestowed on other members of the Bar, however distinguished. This has its disadvantages, for if we had no Q.C.'s all our seniors might claim an equal professional status with English Q.C.'s.

MR. HENRY BODKIN POLAND (1851), of the South-Eastern Circuit, Recorder of Dover, has also been made a Q.C.

MR. EDWARD JAMES CASTLE (1868), Q.C. (1888), has been appointed Recorder of Winchester in room of Mr. Mackonochie, the new County Court Judge.

MR. W. W. M'GEOUGH BOND (1884) has been appointed a Judge of the Native Court of Appeal at Cairo, in succession to Mr. Sheldon Amos.

THE NEW COUNTY COURT JUDGE.—Mr. James Mackonochie has been appointed County Court Judge of Circuit 55 (comprising parts of Dorset, Hampshire, and Somerset), in succession to Mr. Sergeant Tindal Atkinson, who recently resigned office. According to the *Law Times*, Mr. Mackonochie, who is a son of the late Colonel Mackonochie, H.E.I.C.S., was born in 1825. If so, he must have been precocious, for he was admitted a member of the Faculty of Advocates in 1845. In 1855 he was called to the English Bar at the Inner Temple. The new judge has been a revising barrister since 1873, and he was appointed Recorder of Winchester in 1880. This latter office might have been held along with the County Court Judgeship, but Mr. Mackonochie has resigned it. We doubt if it has ever happened before that a member of the Faculty of Advocates became a County Court Judge.

Obituary.

THE LATE MR. JAMES L. MANSFIELD.—Mr. James L. Mansfield, M.A., LL.B., Advocate, died on 19th December, from the effects of injuries sustained by his being thrown from his horse on the Queensferry Road, two days before. Mr. Mansfield was born in 1841, and, after having been educated at Rugby and Cambridge, he was admitted to the Faculty in 1866. For many years he attended the Parliament House with comparative regularity, but, having ample means, he did not lay himself out for practice; and beyond serving for three years in the Town Council of Edinburgh, he never took an active part in public matters. For the last year or two, Mr. Mansfield's

figure has been seldom seen in the Parliament House. He stuck to it faithfully for long, but as one by one his more intimate friends disappeared, he gradually grew irregular in his attendance, and at last ceased altogether to don the wig. As a lawyer Mr. Mansfield would hardly claim recognition here, but for the fact that he was one of the most familiar figures in the most influential circle of legal society in Scotland. Mr. Mansfield was a typical Edinburgh man, wealthy without much ostentation, keenly devoted to all forms of sport, fond of quiet comfort, fond of clubs, well informed, hearty and kindly, and yet at times displaying a certain, perhaps hardly warrantable, exclusiveness. There seems to be a grim irony in the fate that did this Edinburgh man of Edinburgh men to death on the familiar highway where on Sundays, and indeed on all days, to a certain extent, Edinburgh society takes its constitutional. Although Mr. Mansfield had ceased to attend the Parliament House, he will be keenly missed by many a Parliament House man. In the field, by the river, but, above all, upon the links, and at the curling-pond, he will be long held in kindest memory. His small, well-knit figure, his brisk step, his quick, keen eye, and his clear, hearty voice, will be recalled in the scenes where they were so long familiar; and by none will these recollections be more warmly cherished than by his brethren of the Bar.

MR. ALEXANDER GRAEME GROAT, Advocate, died in Edinburgh on the 30th November. Mr. Groat was called to the Bar in 1834, and, after attending the Parliament House for only three years, he left its precincts for ever as long ago as the year of Her present Majesty's accession to the throne. During all that interval he has lived a secluded life, and to the generations who have meanwhile come to the Bar, have run through their careers and passed away, Mr. Groat has been quite unknown.

MR. PETER CLARK, Advocate, Aberdeen, died on 20th December, at the age of 47. Mr. Clark was admitted to the Society in 1865, and had practised in Aberdeen ever since. He was a member of Town Council, and he had interested himself a good deal in a movement to secure a Stipendiary Magistrate for Aberdeen.

MR. THOMAS PADON, S.S.C. (1847), died on 21st December last.

The Month.

The Cost of the English Law Courts.—At the present time, the administration of justice in the Supreme Court of Judicature (which does not include County Courts) costs the country £687,000 per annum (exclusive of pensions), about one-half of which sum is covered by the fees received in stamps on account of proceedings in the Court. £129,000 of the above sum is the cost of buildings, fuel, light, furniture, and stationery; and the judges' salaries appropriate £150,000. The balance of £408,000 is absorbed by officials of all grades, of whom there are 750 in London alone, receiving salaries amounting to £330,000 per annum. 596 of these are to be, or should be, found in the building known as the Royal Courts of Justice, the remainder being located in Somerset House, in the House of Lords, or in the Bankruptcy Buildings in Lincoln's Inn. 205 out of the 750 are messengers, attendants, ushers, tipstaves, etc., the remainder being clerks and officials of various grades, whose salaries range from £100 to £2000. In addition to the above, there are nearly 100 copyists, who are paid by the week, and do not rank as civil servants.



Contempt of Court: A Pugilistic Barrister.—An extraordinary incident occurred at the Cambridge County Court on 28th November. His Honour Judge Bagshawe, having disposed of a small case, retired for some time to his private room to hear an application in bankruptcy. A few minutes after he had resumed his seat on the bench, a personal application was made to him by a gentleman, whose name did not transpire, for a decision as to whether a contempt of Court had been committed in the private room by Mr. Horace Browne, a barrister practising in the Court. The applicant stated, in the absence of Mr. Browne, that without provocation Mr. Browne had struck him on the face in the room which his Honour had just left. Mr. Browne was unknown to him. His Honour—"That is a grave allegation to make in open Court." The applicant—"The Registrar was there." His

Honour—"If that is so, it must be considered as having been done in Court. I cannot now deal with such a matter. You must give notice. I won't now enter into the merits of the matter. All I say is, that the allegation is a grave allegation." At this point Mr. Browne entered the Court, not attired in his gown. His Honour (addressing Mr. Browne)—"A statement has been made." The applicant—"About your striking me." Mr. Browne—"I have not heard the statement; perhaps you will hear mine? I am rather surprised that he should be allowed to make a statement in open Court. I should have thought the statement should have been made on affidavit." His Honour suggested that he should hear the statement later in the day, and informed Mr. Browne that the complaint was, that after the proceedings in bankruptcy, and while the Registrar was still present, Mr. Browne struck the applicant and threatened him. Mr. Browne—"This man said I was no gentleman, and I hit him. Your Honour would assume that personal violence would not be used by me unless it was deserved." His Honour declined to go into that question, and held that Mr. Browne's act amounted to contempt of Court. He intimated that he thought both parties should apologise. Mr. Browne—"For my part I apologise to your Honour at once. I had no notion that what took place in the private room would be considered a contempt of Court." His Honour—"The Court being of opinion that an assault having been committed under such circumstances as to be contempt of Court, and the same having been promptly apologised for in open Court, the Court does not think it necessary to make any further order." The incident then terminated.



Lord Coleridge on Breach of Promise.—In a breach of promise case tried recently, Lord Coleridge, in summing up, said he did not agree with eminent men who had been of opinion that the action for breach of promise of marriage should be abolished. No doubt very refined people would shrink from a display of their wrongs in a Court of justice, but the law was not for such very refined people alone, and persons who had suffered from such wrongs had a right to come into

Court for compensation. And the very existence of such an action had a great deterrent influence, and tended to deter men from wronging women in this way ; and many marriages, fairly happy, took place in consequence. This was the result of his experience at the Bar and on the Bench.



The "Black Man" again.—Section 383 of the New York Penal Code declares that "no citizen of this State can by reason of race, colour, or previous condition of servitude be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by inn-keepers or common carriers, or by owners, managers, or lessees of theatres or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations." The violation of this section is made a misdemeanour punishable by fine of not less than fifty nor more than five hundred dollars. King and Scott, in the year 1884, were the owners and proprietors of a skating-rink in the village of Norwich, in this State, erected in that year upon their own lands. Prior to June 13, 1884, they announced through the public press and otherwise that the rink would be opened on the evening of that day, and they arranged with the "Apollo" Club of Binghampton to attend the opening, to give an exhibition of roller skating ; the profits of the entertainment to be divided between the club and the proprietors of the rink. Tickets of admission were sold on the evening in question by the agents of the proprietors at the office on the premises, but persons who had not procured tickets were admitted on payment of the charge for admission at the door. Several hundred persons attended the exhibition. During the evening three coloured men made application to purchase tickets at the office where tickets were sold ; but the agents of the proprietors having charge of the sale, acting in accordance with the instructions of the defendant, refused to sell them tickets, because they were persons of colour, and they were so informed at the time. King was convicted under the section of the Penal Code above quoted, the indictment alleging in substance, "that the defendant, being one of the owners of a skating-rink, a place

of amusement, did on the day named exclude from said skating-rink, and from the equal enjoyment of any and all accommodation, facility, and privilege of said skating-rink, George F. Breed, William Wyckoff, Charles Robbins, and others, all being citizens of the State, by reason of race and colour," etc. An appeal was taken to the Supreme Court, on the plea that the statute upon which the indictment was founded, so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, colour, or previous condition of servitude, is an unconstitutional interference with private rights, in that it restricts the owner of property in respect to its lawful use, and as to an incident which is not a legitimate matter of regulation by law. The Court, however, held that the section does not infringe the constitutional power in securing the right of life, liberty, and property, but is a valid exercise of the police power of the State.



The Lorimer Scholarship.—A scheme is on foot to found a law scholarship in honour of Professor Lorimer. The proposal is to find funds for a scholarship to enable a student of law to prosecute his studies at some foreign University. But when a student has finished his law studies here, it is too late, we fear, to be thinking of a foreign University. Most men, and certainly the best men, will be eager to enter upon the work of life. This, however, is a matter upon which there may well be difference of opinion. And a more serious objection to the proposal is that these exploitation movements are becoming an insufferable nuisance. There is no end to them. The professoriate of Edinburgh is not a very numerous body, and yet this is, if we mistake not, the third subscription of this kind within the year. We know of no offence that Professor Lorimer has committed that justifies his being treated in this way. On the contrary, we recognise in the learned Professor one of the most distinguished jurists and popular professors of our country, and we regret that he should be made the victim of the irritation which movements of this kind never fail to excite.

The Sittings.—Although the number of jury trials has considerably increased within the last few years, the popularity of the Sittings as the time of trial seems to be on the decline. Five cases were set down for trial at the recent Christmas Sittings, but three of these cases went off, and only two short causes came to trial. Trial by jury of civil causes at the Circuit Courts seems to have fallen into complete desuetude.



MR. JUSTICE STEPHEN is the most hard-working of judges. On the Western Circuit in December he beat his record in the matter of long sitting—a bad one to beat. At Exeter Assizes a big list still remained on the 7th ult., and his lordship was due in Bristol next day. So he sat on consecutively from 10 A.M. on the 7th until 2 A.M. on the 8th, and wiped out the entire list! At 10.30 on the latter day he set out for Bristol.



Male or Female.—Since the days of King Solomon, perhaps no such poser ever troubled the judicial mind as that which presented itself the other day in the Sheriff Court of Aberdeen, when the learned Sheriff was called upon to decide whether a bird produced in Court was in conformity with a warranty to deliver a “cock” canary. From the newspaper reports it would appear that the Sheriff held that the purchaser had failed to prove that the bird was a female, and, having taken delivery, he was bound to pay the price.



“Entitled” to pay.—The Queen’s English suffers sadly sometimes at the hands of the press, and there is no more daring offender than the legal press reporter. In the report of a Sheriff Court assault case the other day, we read, “The Sheriff, in respect of certain extenuating circumstances, ordered M’Ginlay to find £2 caution for six months’ good behaviour, or go to prison for seven days, but pointed out that he was *entitled* to make reparation to Wilson.”



Awkward Mnemonics.—“Gentlemen of the jury,” said

counsel in an agricultural case, "there were thirty-six hogs in that lot—thirty-six. I want you to remember that number—thirty-six hogs—just three times the number that there are in the jury box."

Reviews.

The Anglo-Indian Codes. Edited by WHITLEY STOKES, D.C.L., of the Inner Temple, Barrister-at-Law, Correspondent of the Institute of France, and late Law-Member of the Council of the Governor-General of India. Volume II. *Adjective Law.* Oxford: Clarendon Press. 1888.

WE have received the second volume of this handy and handsome edition of the Anglo-Indian Codes. Mr. Stokes is to be congratulated on the admirable way in which his editorial work has been done. The present volume contains the Code of Criminal Procedure, 1882 (with five appendices); the Code of Civil Procedure, 1882 (with appendix); the Evidence Act, 1872; the Oaths Act, 1873; the Limitation Act, 1877, etc. To the Criminal Procedure Code, the Civil Procedure Code, the Evidence Act, and the Limitation Act, there are useful introductions. Not least important in such a voluminous and comprehensive work is the thoroughly good index.

The University System of Germany. By JOHN P. COLDSTREAM, W.S., Lecturer in the University of Edinburgh on Civil and Criminal Procedure in the Law Courts of Scotland; Extraordinary Member, formerly one of the Presidents, of the Juridical Society of Edinburgh.

THIS pamphlet embodies the Introductory Lecture given in November last by Mr. Coldstream to his class in connection with the University of Edinburgh. An account, slight and perhaps a little sketchy but interesting, and, so far as we can judge, fairly accurate, is given of the German university

system, and a contrast is drawn between that system and the one which prevails in this country, much to the advantage of the former. Mr. Coldstream is greatly exercised by the question why the number of British and American students who study in the German universities so far exceeds the number of Germans who resort to British and American seminaries. In his opinion this lack of reciprocity is to be attributed mainly to the superiority of the German schools. Whilst we fully appreciate the excellence of the German universities, we disagree with Mr. Coldstream in this matter. Why is it that whilst Germany swarms with British tourists a German tourist is quite a rarity in Scotland? Not surely because the scenery of Germany is superior to that of Scotland, but because the British are wealthier, more enterprising, and far more restless and go-ahead than the Germans. Medical students, no doubt, go to Vienna and Paris for the sake of special educational equipments at these schools, and for similar reasons a few of our theological students and young licentiates attend the German universities; but the great majority of the English-speaking students at the German universities are there not for the sake of special instruction, or because they have sought out educational seminaries superior to our own, but because they desire to attend a *foreign* university and acquire a foreign tongue.

As Mr. Coldstream points out, the German teaching staff is far more comprehensive than our own, embracing not merely the ordinary professors, but also extraordinary professors, and "Privat Dozenten," all of whom are integral portions of the university system. We are convinced that this is the true line for university reform in Scotland, and that those would-be university reformers who are striving to extend "*extra-mural*" teaching, and who seem incapable of realizing that there may be *intra-mural* rival teaching, are working for the disintegration of our universities, or their conversion into mere examining bodies. If Mr. A. is recognised by the university court as qualified to lecture on surgery, Mr. B. on natural theology, Mr. C. on modern history, and Mr. D. on private international law, why should they be driven out to an extra-mural school? Why should their classes not be

part of the university system? why should those attending these classes not be students of the university, subject to full academic discipline and control? In the face of the success of the system in Germany, it seems absurd to propose to *develop* the Scottish university system by building up rival and independent schools outside the university walls.

Mr. Coldstream refers to duelling in Germany. In this connection there is one singular passage:—

“I have been informed on good authority that the German student who has the greatest number of scars upon his cheek is the partner in the dance who is in highest favour with the German *belle*; but when she comes to select her husband, it is the scarless man who is the object of her choice. From what I have observed, I do not think it would be very difficult to abolish the system. On one occasion, at a students’ ‘*kneipe*,’ I ventured with a gloved hand to enter my protest against it, as alike opposed to the laws of God and man, as well as to decency and civilisation, and I am glad to say my remarks were received with favour and applause.”

Now what does Mr. Coldstream mean? Does he object to the lady’s preference for the scarred partner in the dance? If so, we will not quarrel with him, though we fear the task he has set himself in seeking to abolish this system will prove beyond even his energies. “It is pretty Fanny’s way.” We must say, moreover, that “opposed to the laws of God and man, as well as to decency and civilisation,” seems to us language out of all proportion to the offence. But perhaps what Mr. Coldstream objects to, is the female preference for a scarless man when she comes to select her husband. In that case we can scarcely agree with him; but we are not surprised that, bearing himself the scars of his famous tilt with the Windmill in 1886, Mr. Coldstream should resent any reproach cast upon those who have gone down in the fight.

There is one feature of Mr. Coldstream’s interesting pamphlet which we note with regret. Slipshod English is always a grievous blemish, and it is doubly regrettable in the case of a teacher of youth. We are sorry to observe that Mr. Coldstream’s text bristles with solecisms and with inaccuracies and inelegances of expression. Such a statement needs to be

supported by citation, and therefore we note the following examples:—

“Kind revision of most of the facts.”

“He has a larger salary than most of the professors, being about £450 per annum.”

“As a rule, on an average, the professor lectures . . .”

“He cannot, although a State official, against his will, be merely transferred from one university to another.”

“In one university—Marburg—if not others . . .”

“Most of these clubs also have as one of *their* objects the training and exercise of *its* members . . .”

“Protected *in their eyes and the vital parts of their bodies.*”

“The toleration of duelling in a modified form, and the spirit thus engendered, occasionally *leads* to duelling of a graver character among the students, when heavy swords *and bared bodies, or pistols*, are the order of the day.”

“*Many* of the clubs have *as a rule a cap.*”

“The general conduct of the German *student* is exemplary and correct. After a beer-drinking reunion *they* . . .”

“The student who . . . and there exist bursaries for *their* benefit.”

“*The British and, in some cases, American student* is not conspicuous *by his absence* at the German university.”

“How many, if any, German students, as a rule . . .”

“The source whence his nomination, though not actual appointment, takes place . . .”

“But while the exception is, that the German resorts to our universities . . .”

“If, then, we are to consider that the object of the university is to afford to the youth of a State the means of acquiring all knowledge and information on every possible branch of science, *and not merely as a means of imparting a smattering* . . .”

“In this way the student does not merely get from lectures general information on a subject, and thus has the opportunity of becoming . . .”

“There is no one subject in a Faculty which as a *preferential* course *must* be taken.”

We ought, perhaps, to apologise for this long citation, and one knows that the best writers are not always accurate in expression, but when one can pick the passages we have quoted above—and we might have given others—out of a pamphlet of twenty pages of large type, and that by a member of the legal profession and a University lecturer, it is time to speak out. There are bounds to everything, and here, we think, the bounds have been overpassed. There can be no doubt that the hurried style of composition now in vogue is most injurious to accuracy of expression. Even in pleadings in Court adjusted by counsel, one constantly observes the grossest inaccuracies and solecisms. There is hardly a summons which does not contain the word “presently,” used in the utterly erroneous sense of “at present.” One would have supposed that a lawyer of Mr. Coldstream’s industry would have acquired greater precision of expression during his long service at the Clerks’ table; but perhaps a study of the German university system is as damaging to precision and lucidity of expression as is the study of German philosophy.

Notes pour servir à L'Histoire Littéraire et Dogmatique du Droit International en Angleterre. Par ERNEST NYS, Professeur à l'Université de Bruxelles. Première Partie. Bruxelles: C. Muquardt. 1888.

M. NYS might fairly have given to this work—which he modestly describes as consisting merely of *Notes for the History of International Law in England*—the title of such a history. It is a comprehensive work, and it traverses the ground with completeness. The author has, obviously, made very considerable research into the materials available; and he has arranged his matters in a systematic and useful form, and presented them with many original criticisms and generalizations. After alluding to the late origin and slow growth of International law, and after indicating as the causes of such tardiness the feudal system and the exclusiveness of the Church (which treated all beyond its pale as barbarians with whom no comity was to exist), M. Nys deals with the development of the law in England under two heads. First, he treats of the origin and growth of the *Theory*, tracing its

gradual working out in a crude form in the earlier writers, and coming down to More and the disciples of Utopia. Of Bacon, Selden, and Hobbes we find the criticism: "Les trois illustres Anglais . . . auraient pu rendre au droit des gens de grands services. Tous trois apportèrent leur part de travail, mais ç'a été dans une trop faible mesure." In the second division of the work the author deals with the *Practice* in England in regard to International law. He limits himself to an exposition, under a variety of heads, of those international juridical relations in which the practice of England either merely differed from that of other countries, or constituted an advance on that in vogue elsewhere.

English Decisions.

NOVEMBER 20TH TO DECEMBER 17TH.

TRUSTEE.—*Sale of trust property to stranger—Subsequent purchase by trustee—Lapse of time.*—In 1854 a trustee of certain property, shortly after it had been sold to another person, purchased it from him at a very small increase in price, and in 1874 the trustee sold the property at a large, increased price. In 1886 certain beneficiaries commenced an action against the executors of the trustee, claiming the increased price received, alleging that the purchaser in 1854 was put forward by the trustee, and that there was an understanding between them that the trustee should afterwards purchase the property. *Held*, that the facts being capable of a reasonable explanation consistent with the validity of the transaction, the Court would not presume it was not valid when it took place so many years ago, and the parties were dead, merely because some facts were suspicious.—*Postlethwaite v. Rickman*, Ct. of App., 20 Nov. 1888.

RESTRAINT ON EMPLOYMENT.—*Interdict—Penalty.*—Where an employee had bound himself under a penalty not to enter business within a specified area within two years from the close of his term of employment, the employer was entitled to an injunction restraining such employment, and his remedy was not limited to the recovery of the penalty.—*Nat. Provincial Bank of England v. Marshall*, Ct. of App., 22 Nov. 1888.

RAILWAY COMPANY.—*Debenture Stock—Priority.*—*Held*, that the holders of debenture stock in a railway company have no lien or charge on the proceeds of surplus lands of the company which have been sold, in priority over the other creditors of the company.—*Re The Hull, Barnsley, and West Riding Junction Railway and Dock Company*, Ct. of App., 24 Nov. 1888.

WILL.—*Legacy—Gift to executors of legatee—Residuary gift by legatee to testator—Intestacy.*—A testator gave the residue of his property to A., and, in case of his decease, to A.'s executors or administrators. A. died in the lifetime of the testator, having bequeathed to the testator the residue of his property. *Held*, that the property passing under the gift of the testator to A. was not to be treated as forming part of the testator's estate, and so to be distributed again under his will, but went to his next-of-kin. —*Re Valrey's Trusts*, Ch. Div., 24 Nov. 1888.

EMPLOYER'S LIABILITY ACT.—*Defect in condition of works—Volenti non fit injuria.*—*Held*, that where a workman is aware of a defect in the condition of his employer's plant, and goes on working, there is evidence of his willingness to incur the risk, and he is not entitled to recover damages for injury sustained through the defect. —*Church v. Appleby Brothers*, Q. B. Div., 26 Nov. 1888.

BANKRUPTCY.—*Solicitor and client—Address of debtor.*—*Held*, that a debtor's address, communicated confidentially to his solicitor when applying to him for advice, is privileged from disclosure, unless such communication was made to the solicitor whilst the solicitor and the debtor were jointly engaged in the commission of some offence. —*Re Arnott*, in Bankruptcy, 22 Nov. 1888.

CRIMINAL LAW.—*Obscene libel—Letter inciting recipient to act of immorality.*—A prisoner having been indicted for (*inter alia*) having written and published an indecent and obscene libel concerning a young woman, in the form of a letter directed to her in answer to an advertisement for a situation inserted by her in a newspaper, and that in the letter he had made an immoral proposal to her, the jury, by the direction of the learned Recorder, found a verdict of guilty. *Held*, that as the sending of such a letter to a young woman might reasonably provoke on her part, or on the part of her family, a breach of the peace; and that as the pursuer was charged with having written a libel concerning her, it was a question for the jury whether the letter contained a defamatory libel tending to asperse the character of the person to whom it was written, and to bring her into contempt, and calculated to provoke a breach of the peace: That the jury, having found the prisoner guilty, must be taken to have found that the letter contained such a libel, and that the prisoner was therefore rightly convicted. —*Reg. v. Adams*, Crown Cases Reserved, 24 Nov. 1888.

COSTS.—*Administration action—Delay and negligence of executor—Disallowance of costs out of estate.*—*Held*, that the Court will not allow the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care: that the amount of costs allowed by a taxing master, as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate; and therefore that the Court had jurisdiction to refuse to allow the executor to have the full amount of the costs allowed him on taxa-

tion paid out of the estate where there had been great delay.—*Brown v. Burdett*, Court of Appeal, 27 Nov. 1888.

PRIVILEGE OF PARLIAMENT.—*Held*, that where a process is of the nature of a punishment for disobedience of an order of Court, a member of Parliament has no immunity from arrest.—*Gent Davis v. Harris*, Ch. Div., Mr. Justice North, 16 and 27 Nov. 1881.

LICENSING ACTS.—*Club.*—N. was the manager of the Dumfries Club Company Limited, which was established to provide a club-house, hotel, and other conveniences for the use of the company. The capital of the company consisted of 400 shares of five shillings each, of which one shilling per share was paid up. Apart from the paid-up portion of the capital, the club depended entirely for the payment of its current expenses on cash taken for supplies of excisable liquors or food to shareholders. The premises occupied by the company consisted of five rooms, for which they undertook to pay £36 per annum and rates. Any person applying for a share paid one shilling to the secretary of the company, but did not obtain the privileges of the company until his name had been submitted to the directors, and he had received an allotment from them. N. admitted that he had supplied excisable liquors to shareholders, and had received money from them, but alleged that he had no personal interest in the money received, except indirectly, such money being the main source of income to the company, and his position as manager being dependent thereon. On this evidence N. was convicted under 35 and 36 Vict. cap. 94, sec. 3, at Petty Sessions, of selling intoxicating liquor without a licence, and fined £50. *Held*, on a case stated, that the conviction was bad.—*Newell v. Hemingway*, Q. B. Div., 28 Nov. 1888.

SOLICITOR AND CLIENT.—*Uncertificated solicitor.*—Where the person who acted as solicitor for a successful litigant was not qualified, although he practised under the name of a qualified solicitor, held that costs could not be recovered against the unsuccessful litigant.—*Irving v. Sanger*, Q. B. Div., 30 Nov. 1888.

NEW TRUSTEES.—*Trust corporation.*—A petition for the appointment of new trustees showed that the proposed new trustees were connected with a corporation formed for the purpose of undertaking the administration of trusts. The persons proposed were in a good position and personally unobjectionable. *Held*, that the Court would not in any way recognise the corporation. The proposed trustees might be appointed, but with a warning that they would be held personally liable for the execution of their trusts, and any delegation of their duties to the corporation would be at their own risk. The petition was ordered to be amended by striking out all reference to the corporation.—*Billing v. Brogden*, Ch. Div., Mr. Justice North, 2 Dec. 1888.

DONATIO MORTIS CAUSA.—*Corroborative evidence.*—Observed that although a claim to a *mortis causa* donation must be regarded with the strictest scrutiny, jealousy, and suspicion, yet there is no

absolute rule of law, but only a rule of prudence, that the testimony of the claimant must be corroborated. — Per Kekewich, J., in *Wildish v. Fowler*, Ch. Div., 4 Dec. 1888.

POLICY OF ASSURANCE.—*Fraud—Compensation.*—The tenant for life under a settlement dated 1832 had under the settlement a special power of appointment by deed or will among his three children of a policy of assurance on his own life, the tenant for life being bound to keep up the policy. In 1852 the tenant for life appointed the policy in favour of one of his children, under an arrangement by which the policy was surrendered for the benefit of the tenant for life. An action having been brought against the widow of the tenant for life, who died in 1887, alleging that the settlement was a fraud, and the Court, so holding: *Held*, that the compensation to be paid out of the estate of the tenant for life to the persons entitled as in default of appointment, was such a sum as would at the death of the tenant for life have been payable upon the policy if it had been kept on foot, with interest at 4 per cent. from the time the moneys would have been received by the trustees.—*Bridger v. Dean*, Ch. Div., Mr. Justice Kekewich, 5 Dec. 1888.

WILL.—*Legacy—Charity—Lapse.*—A lady left £1000 to a clergyman for the benefit of a society for suppressing cruelty by united prayer. The society had been founded by the testatrix, and although at one time it had several thousand members, it had no rules, and its business was carried on entirely by the testatrix, who edited an annual periodical, and issued tickets with a form of prayer to members. For several years prior to her death her health had been enfeebled, and nothing had been done in the way of the work of the society. *Held*, that on the evidence the testatrix was the society herself, that it came to an end upon her decease, and accordingly that the legacy to the society lapsed: *Held*, further, that the object of the Society was rather for the improvement of the members than for suppression of cruelty to animals by any ordinary means, that this was not a purpose of general utility, and that, therefore, the legacy lapsed to residue.—*Purday v. Johnson*, Ch. Div., Mr. Justice Chitty, 5 and 6 Dec. 1888.

WILL.—*Construction—Ejusdem generis.*—*Held*, that a legacy of "all the household furniture and effects" in and about the testatrix's house at A. did not include jewellery found in the house at A. —*Northey v. Paxton*, Ch. Div., Mr. Justice Kekewich, 7 Dec. 1888.

INCOME TAX.—*Bankers—"Yearly interest"—Interest on short loans.*—*Held*, that a bank is entitled to allow the income tax upon short loans for less than a year to customers to be deducted by the customers, and that a bank is not liable to be assessed upon the sums received as interest for such loans.—*Goslings & Sharpe v. The Surveyor of Taxes*, R. B. Div., 10 Dec. 1888.

WILL.—*Legacies to two societies—Subsequent amalgamation.*—A testatrix left two legacies of £200 each to two anti-vivisection

societies. After the date of the will, and before the testatrix's death, the societies were amalgamated. *Held*, that the united society was entitled to both legacies.—*Purday v. Johnson*, Ch. Div., Mr. Justice Chitty, 11 Dec. 1888.

INCORPORATED COUNCIL OF LAW REPORTING.—*Inland Revenue—Public body—Liability to account—Exemption.*—The business of the Incorporated Council of Law Reporting has been carried on at a considerable profit, which has been accumulated and invested, but no part of such profits has been divided among the members of the Council, such division being prohibited by the Articles of Association. *Held*, (1) that the Council were not bound to account to the Commissioners of Inland Revenue under sec. 15 of the Customs and Inland Revenue Act of 1885 (48 and 49 Vict. c. 51); and (2) that they were not liable to the duty imposed by that Act, as they came within the exemption of sec. 11, sub-sec. 5, of the Act as being a body-corporate, established for a trade or business.—*The Commissioners of Inland Revenue v. The Incorporated Council of Law Reporting for England and Wales*, Q. B. Div., 11 Dec. 1888.

INCOME-TAX.—*Donation to clergyman.*—*Held*, that a sum of £50 given to a curate from the Curates' Augmentation Fund was not liable to income-tax, as such sum was not given to him as curate of G., but as a donation for faithful services in his profession for a space of more than fifteen years.—*Case for the Commissioners of Inland Revenue*, Q. B. Div., 11 Dec. 1888.

EMPLOYERS' LIABILITY ACT.—*Person to whose orders workman is bound to conform.*—Where two workmen are engaged together at a machine, and one gives the other the signal to perform a certain operation: *Held*, that this is not an "order," to which the workman receiving it is bound to conform, within the meaning of sec. 1, sub-sec. 3, of the Act.—*Howard v. Bennett & Sons*, Q. B. Div., 13 Dec. 1888.

LICENSING.—*Renewal—Discretion of justices.*—*Held*, that the licensing justices have the same absolute discretion upon the renewal of a licence which they have in regard to a new grant.—*Sharpe v. Wakefield*, Court of Appeal, 14 and 15 Dec. 1888.

ADMINISTRATION.—*Scheme for sale of testator's interest in a business to a limited company.*—*Held*, that the Court had no jurisdiction to sanction agreements which had been entered into for the sale of the testator's share in a mining and manufacturing business to a limited company, the purchase-money being paid in shares of the company, which were to be distributed among the persons beneficially interested under the testator's will or their trustees, some of the interests being settled by the will, although it was alleged that the proposed scheme was the only mode in which it was possible to realize the testator's share in the business advantageously.—*Dennis v. Crawshaw*, Ch. Div., Mr. Justice North, 17 Dec. 1888.

TRADE MARK.—*Registration—Descriptive word—Foreign word—Patents, Designs, and Trade Marks Act, 1883, sec. 64, 1 (c).*—*Held*, that the word “Ko’ koko” could not be registered as a trade mark, as that word is used by the Chippeway Indians for “owl,” and as the device of an owl, being common property, could not be registered as a trade mark even in a foreign language, and even where, as in the present case, there was no evidence of any trade in cotton goods with the Chippeway Indians, the people using the word, because it was possible such trade might extend to them in the future. *Held*, further, that the word “Ko’ koko” too nearly resembled “coco”—Manchester slang for exported cotton—to be entitled to registration.—*Re The Jackson Company’s Application*, Mr. Justice Kay, 17 Dec. 1888.

Sheriff Court Reports.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs BALFOUR and BERRY.

D. A. M'DOUGALL & CO. v. JAMES M'CHEYNE & CO.

Process—Cessio—Expenses.—The debt was paid after service of a petition for cessio.—*Held*, that notwithstanding no trustee had been appointed, the petitioners were entitled to the expenses of the cessio proceedings.

This was a petition at the instance of D. A. M'Dougall & Co., 13 Drury Street, Glasgow, against James M'Cheyne & Co., auctioneers, Candleriggs, Glasgow, and James M'Cheyne, auctioneer there, the sole partner of said company, to have the defenders ordained to execute a disposition *omnium bonorum*, and to appoint a trustee to distribute their estates. The Sheriff-Substitute, Mr. Balfour, on 25th August 1888, granted the usual warrant of service, and ordained the defender James M'Cheyne to appear on the 11th September thereafter for public examination. The notice for the *Gazette* was sent off on Thursday the 30th August, in order that it might appear in the *Edinburgh Gazette* of the next day, Friday being the last day for advertising, in terms of the Sheriff's warrant. On the Friday forenoon the defender and his agent called on the pursuers' agents, and paid them the sum of £5, 16s., with 4s. 10d. of expenses, being the amount contained in the decree at pursuers' instance against defenders, but refused to pay any expenses of the cessio proceedings. The pursuers' agents accepted this sum, and granted a receipt therefor under reservation of the expenses of the cessio proceedings. The question afterwards came up before Sheriff Balfour, when the defender's agent contended that the pursuers were not entitled to expenses, in respect that the debt had been paid, and that as no trustee had been appointed, the pursuers could only recover expenses from the

latter out of the first and readiest of the funds to be recovered by the trustee. After hearing parties, Sheriff Balfour pronounced the following interlocutor, which fully explains the case:—

“*Glasgow, 17th October 1888.*—Having heard parties’ procurators, for the reasons assigned in the subjoined note, Dismisses the petition : Finds the defenders liable to the pursuers in the sum of £5, 5s. of expenses, and decerns. (Signed) D. D. BALFOUR.

“*Note.*—In this petition there is a craving that the pursuers should be entitled to expenses ; and, in the second plea-in-law, that plea is elaborated to the effect that the expenses of the action should be paid out of the readiest of the funds to be conveyed by the disposition *omnium bonorum*. The defenders lodged a caveat, and I heard the parties on the caveat, and thereafter granted the usual first deliverance. The defenders then paid the debt, and they now seek to get clear of the expenses because the pursuers in their second plea-in-law crave that the expenses should be paid out of the readiest of the funds, and there are no such funds. It appears to me to be absurd to hold that under the original craving for expenses in the petition, I cannot pronounce decree against the defenders for the taxed expenses of the process. It is the defenders who have resisted the petition, and they ought to pay the expenses of resisting it. Under all the circumstances, however, although the account has been taxed at a larger sum, I am disposed to modify it to £5, 5s. (Intd.) D. D. B.”

The defenders afterwards appealed the case to Sheriff Berry, and although the competency of the appeal might have been objected to, the pursuers did not take this course. After hearing parties’ agents, Sheriff Berry pronounced the following interlocutor, adhering, and finding the defenders liable in £1, 1s. of additional expenses :—

“*Glasgow, 29th November 1888.*—Having heard parties’ procurators, and considered the cause, Adheres to the interlocutor appealed against : Finds the defenders liable to the pursuers in the sum of £1, 1s. of expenses in respect of this appeal, and decerns. (Signed) “ROBERT BERRY.”

“*Note.*—I think it impossible to sustain the defender’s contention in this case. The prayer of the petition concludes thus, ‘to find pursuers entitled to expenses of process.’ That, I think, complies sufficiently with the provision of the Act 1876, which, according to the note to Schedule A, requires that where expenses are sought, they must be prayed for. It is said that by their second plea the pursuers have in effect limited the prayer of the petition to a claim for expenses out of the readiest of the funds to be conveyed by the disposition *omnium bonorum*. In that plea, however, the pursuers merely follow out the provisions contained in the ‘Debtors (Scotland) Act, 1880,’ which directs the payment of the expenses out of the readiest of the funds to be obtained. I do not think that the

plea has the effect of limiting the prayer of the petition in the way the defenders contend. To hold that it had that effect would lead to the result that a creditor, who instituted a process of cessio which was resisted by a debtor, would not recover his expenses, if the debtor chose and was able at a subsequent stage to pay the debt, unless there was special plea founded on the pursuers having a right to expenses from the debtor himself. I cannot hold that it is necessary for a creditor to set forth in terms such a plea. The conclusion for expenses in the prayer of the petition seems to me sufficient for the purpose. (Intd.) R. B."

Act. Wilson—All. Fergus.

SHERIFF COURT OF BANFFSHIRE.

Sheriff HAMILTON GRIERSON.

G. & R. CAMERON *v.* WILLIAM LAING.

Arbitration—Clause of reference in (1) general conditions, and (2) specifications—Arbiter unnamed—Clause executorial of contract—Exclusion of ordinary action.—General conditions and specifications for the erection of a house contained the clauses quoted in the Sheriff-Substitute's note.

Held, that the architect's name could not be read into the clause of reference in the general conditions, and that that clause, as it was merely executorial, was not such as to exclude the jurisdiction of the Court in the question raised.

The pursuers contracted to execute the carpenter work of a house for the defender, and signed general conditions and specifications containing the clauses referred to. The following pleas were stated by the parties:—For the defender: "(1) The subject-matter of this action, with the exception of account No. 2, falls to be determined by the arbiter, and the action is excluded by the reference clause in the general conditions and specifications." For the pursuer: "(4) The reference clause in the general conditions does not exclude the jurisdiction of the Court."

The interlocutor and note of the Sheriff-Substitute sufficiently explain the points raised.

"*Banff, 20th November 1888.*—Having resumed consideration of the cause, Sustains the pursuer's fourth plea-in-law under reference to the annexed note, and ordains the cause to be put to the roll for further procedure.

(Signed) "PHILIP J. HAMILTON GRIERSON.

"*Note.*—This action, raised by Messrs. G. & R. Cameron, carpenters, concludes for payment of £54, 8s. 9d. for carpenter-work executed to the defender's order, of which sum £20 is balance of contract price, and £34, 8s. 9d. charge for extra work. The

defender tenders £36, 10s. 10d., of which £33, 19s. 10d. has been certified by the architect as the final instalment due, and £2, 11s. being the amount of the pursuer's claim which the defender admits. The tender is made on the condition that the pursuer shall abide by the architect's certificate. In the event of his disputing it, the defender claims £18, 10s. in name of damages. It is to be observed that the defender has been in possession of the buildings upon which the work in question was done, since July 1887. The only point to be at present determined is whether the jurisdiction of the Court is excluded by the clause of reference. It is clause 12 of the general conditions, and is in the following terms:—'The whole of the work to be subject to the inspection of the architect and the clerk of works, who shall be empowered to exercise full authority fairly and moderately. No day work or other charge will be allowed; and without the certificate of the architect no payment will be considered due. All disputes upon matters and things relating to the contract shall be referred to the architect, whose decision shall be final and binding on all parties.' Here there is no arbiter named. But it was argued that along with this clause must be read the specification of carpenter work, of which the first paragraph runs thus:—'It is to be understood that the accompanying general conditions are to form part of this specification, in so far as they refer to him or his work.' At the end of his specification is the following paragraph:—'*Generally*, The whole of the carpenter work, etc., herein referred to as shown on the plans, to be executed without omissions of any kind of materials or workmanship whatever, to the full intent and meaning of the plans and specifications, although every item may not be particularly shown or specified, to be done in style of that specified to the satisfaction of Duncan M'Millan, architect, Aberdeen, or his inspector.' Throughout all the specifications the plans are frequently referred to, and they are signed by M'Millan; and it was argued that by reading all these documents together, the reference in clause 12 is to an arbiter named. I am of opinion that clause 12 cannot be so read; and I think that that clause is not an arbitration clause, but that it is a clause containing a reference executorial of the contract to the architect for the time being. (*M'Leod v. Adams*, 1861, 24 D. 75; *Kirkwood v. Morrison*, 1877, 5 R. 79; *Savile Street Foundry Co. Limited v. Rothesay Tramway Co. Limited*, 1883, 10 R. 821; *Beattie v. Macgregor*, 1883, 10 R. 1094.) The wording of the clause of reference in *Mackay v. Parochial Board of Barry*, 1883, 10 R. 1046, and in *Levy & Co. v. Thomson*, 1883, 10 R. 1134, completely distinguishes those cases from the present case. In this view the clause does not exclude the jurisdiction of the Court.

(Intd.) "P. J. H. G."

Act. Fleming—Alt. Stephen.

All communications for the Editors to be addressed to the care of the publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

Coroners' Inquests for Scotland.—Amongst the questions which were pressed upon the candidates during the late Govan election, by the labour associations, was that of the introduction of Coroners' Inquests into Scotland. Now, there may be something to be said in favour of such a change, but certainly the absence of such a practice in Scotland does not strike one as a particularly clamant working-man's grievance. We are not aware that there have been any recent cases of abuse or complaint under the present system, and we do not appreciate the benefit which the change would confer upon the working-classes specially. Our present system seems to work fairly well, and it is, we believe, in accordance with the practice of the great majority of civilised States. It may appear to some that in a certain class of cases public inquiries would increase public confidence and security. But the experience of recent public inquiries in England, and their results, are certainly not encouraging. There can be no doubt that several of the atrocious crimes which have occurred recently, are attributable to the morbid excitement occasioned by the details made public by the reports of coroners' inquests. Another objection to the system is the enormous tax it places upon business men. It should be remembered that whereas in Scotland every case of sudden death is investigated by the Fiscal, so in every such case in England, even in cases where there is not a suggestion of foul play, a

jury of twelve men must be got together, must go and view the body, hear evidence, and return a verdict. In large towns like Liverpool there is a highly paid official whose sole duty is that of coroner, and there is an omnibus kept in regular employment conveying the jurymen to the scenes of the inquests. If we are to have the system in Scotland, certainly it ought to be in the discretion of a magistrate, or of some other responsible official, to order an inquest or not, as the circumstances of each particular case might seem to require. The existing safeguards against abuse or concealment of crime seem ample. Everything does not, as is popularly supposed, depend upon the Procurator-Fiscal. That official reports all inquiries to the Crown Office in Edinburgh, and the Crown Agent lays the papers before the Advocate-Depute. Every case, even of sudden death without attendant suspicion, has to pass through the hands of three responsible officials,—the Procurator-Fiscal, the Crown Agent, and the Advocate-Depute.



Pleading Diets and Previous Convictions.—One of the ends sought to be obtained by the recent Criminal Procedure (Scotland) Amendment Act, is that the jury in a criminal trial shall not have before them knowledge of any previous convictions which may have been obtained against a prisoner. They are to approach the consideration of his case as if he had a clean bill of health. With this object, copies of the indictment, in which the previous convictions are libelled, are no longer handed to the jury; and even the printed lists of cases, in which these also appear, are scrupulously kept from their view. This is as it should be. But what avails it all when reports of the Circuit Court Pleading Diet are published in the newspapers as at present? Thus, one day last month, the local newspapers in a Circuit town fully detailed the charges against all the prisoners called upon to plead, and specified that in one case ten, in another seven, previous convictions were libelled against the prisoners, and so on. They pled not guilty, and were remanded to the Circuit Court Diet ten days later. Now, in this way the purpose of the Act is in a considerable measure

defeated. With a small calendar of cases in a country place, an ordinary newspaper reader carries away a perfectly distinct remembrance of the fact that the prisoners to be tried at next Circuit Court have been previously convicted of crimes "of a like nature." And jurymen are just chosen from ordinary newspaper readers.

* * *

Affidavits before Justices of the Peace.—*In re Blair*, for recall of sequestration, some rather startling disclosures were made as to the laxity of practice followed by Justices of the Peace in the matter of administering the oath to deponents. It appeared in the proceedings that the Justice before whom the oath of the petitioning creditor was taken did not put him on oath or interrogate him in any way in regard to the contents of the affidavit. The document, of course, bore at the beginning of it, that the person compearing was "solemnly sworn and interrogated." Nevertheless, he was subjected to neither the one ordeal nor the other; and there was reliable evidence to show that in practice deponents never are sworn or interrogated. Their Lordships of the First Division made some strong comments on this very gross irregularity. The Lord President described it as "a practice that was utterly illegal, and, he thought, also immoral." It is surprising how loose are the ideas prevailing, on the part both of the deposing public and of the Justices themselves, in regard to the solemnities of an affidavit. We heard of a case the other day, in which a gentleman wished to make an affidavit in regard to certain imported goods stopped under the Merchandise Marks Act. He was too busy to attend before the Justice; so he signed the affidavit in his own house, and sent it to the Justice with a polite note requesting him to sign it! It is to be hoped that the strong indication of opinion from the Bench will have a salutary effect, and that Justices of Peace will cease the practice of swearing what they know to be untrue.

* * *

Judges and the Oath.—The judges having rebuked the conduct of their inferiors, might with advantage proceed to

set their own house in order. Not so very long ago, it would have been deemed impossible for a witness to be sworn except according to the ancient form. The judge stood up, and, holding up his right hand, directed the witness to do the same, and to repeat after him the words, "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth." But these are the days of sixpenny telegrams; and sixpenny telegrams are a standard in style. The first innovation upon this ancient ceremony was caused by the disinclination or inability of the judge to stand up, and the oath is now usually administered sitting. The next departure was the omission of the judgment-day,—presumably on the ground of the difficulties presented to "cultured" minds by such an ordeal,—and the oath as administered, by at least our Justiciary judge, has now been reduced to the simple and unencumbered form of: "I swear by Almighty God, that I will tell the whole truth." There is no guarantee of finality even in this. Possibly, as their Lordships' views advance, reference to the Deity may disappear, and we may have nothing but a promise to tell what the witness conceives to be "truth." Two questions have occurred to many people in connection with these innovations. Are they legal? Are they expedient? Most practitioners answer the latter in the negative; and there are not a few who give a similar answer to the former.



Scottish Divorce Statistics.—There was a further increase in the number of actions of divorce in the Court of Session last year, there being 23 in excess of those in 1887. This increase is, oddly enough, found side by side with a decrease in the number of separation cases, showing a tendency on the part of suffering spouses to seek the more thorough remedy. The two classes of cases amounted together to 136 in 1888, as against 125 in the previous year. The increase is not necessarily to be deprecated. It is, perhaps, in one view of it, to be welcomed. We are inclined to believe that it has arisen neither from a greater amount of marital unhappiness in the country, nor merely from a proportionate increase in

the population ; but rather from the fact that this remedy is now so well within reach of all classes of the community. It is not an exclusive privilege of the rich, as in certain countries. The figures inform us that the ladies predominate as pursuers (91 against 45), which would seem to show that if they are the more anxious to enter, they are also the more anxious to leave, the married state. Infidelity still supplies the ground of action in the greater number of cases. It occurs in 62 of the actions ; but desertion runs it close, occurring in 59. Cruelty was the ground in only 15 cases. Manifestly cases of this class are not brought in the Court of Session without probable cause ; for, out of 136 cases, decree was refused in 7 only. The published statistics do not state how many actions were undefended. The proportion, however, is a large one.

Those about to marry, especially those ladies about to marry, may glean some useful advice from these divorce statistics. It can, for example, be seen which districts in Scotland are most to be avoided by those who desire to *remain* married. Most valuable, however, are the statistics, showing the professions and callings of the husbands who were parties in these actions of last year. Ladies may notice which occupations are to be avoided in choosing a partner, because it is clear that a class which figures largely in such cases consists of men who are either bad husbands or who are difficult to please. Now, could it have been anticipated that the praiseworthy calling of a blacksmith is most numerously represented ? Joe Gargerys appear to the number of 5. Next come masons and seamen, of each of whom there were 4. Farmers, warehousemen, and ships' stewards are also to be avoided, we regret to point out. But the discouraging feature of the statistics is, that there is scarcely any calling which is not represented by one member.

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Private Bill Legislation.—Everybody is with us—the Government, the Parliamentary Committee, the Scottish Members, the Town Councils, the Parliament House, the Procurators, and the Trade Associations—everybody except the vested interests. The “but,” however, is a big one.

The vigour and unanimity of opposition seems to stimulate rather than overwhelm the vested interests, and after every round they come up again smiling, ready to try another fall. One at a time, or all at once, it is the same to them, they are always ready for us; and, indeed, they seem more amused than alarmed at our energy and bluster. If anything is to be done during the coming session, we will require to put our feet down with far more decision than we have hitherto displayed. We are often told that if Scotland is agreed in asking anything, Scotland will get it. Scotland is agreed this time, and if we don't get it, the Government must tell us the reason why. Obstruction is always a valuable, and often an unanswerable excuse, but that plea won't do until the thing is tried. Let the Bill be tabled, and then if the obstructives defeat it, the excuse will be listened to. But the Bill has not yet seen the light; it has not, so far as we are aware, been put in draft. Obstruction can hardly be answerable for this. We wonder that the Government do not see the political importance, from their point of view, of pressing on this measure. We have no politics, and we do not discuss politics here; but it would be affectation to pretend ignorance that the Government do not look with favour upon the Scottish Home Rule movement, and that any development of that movement would have an adverse influence upon their position in relation to Ireland. But, if there is one thing more than any other, calculated to foster dissatisfaction with our present parliamentary constitution in Scotland, it is this arrangement, whereby, for every little gas and water Bill, recourse must be had to London. Decentralization is a big word; there are a thousand difficulties and objections in the way of any large changes in our existing legislative arrangements; but this matter of Private Bill Legislation is one plain to every understanding, about which in Scotland there is really no difference of opinion, and which might be carried through without any interference with the general legislative machinery or executive government of the country.

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The Local Government Bill for Scotland.—We trust it is

not too much to hope that ere our next issue sees the light, the particulars of the Local Government Scheme for Scotland will be before the country. The change in Scotland will not be so revolutionary as in England, but for all that the measure will be the largest and most important Scottish Bill of the generation. It would be idle to attempt to anticipate the details of the measure; and it would be rash to express any hopes or wishes in the matter, lest, when the Bill appears, some things, which we had said we wanted, should not appear in it, and we were still to find it necessary to stand by the Bill. There are quite a crop of open questions as to what the Bill will, and what it will not, contain. Shall we have councillors elected by co-optation, or aldermen, as they are called, as in England? Shall parish administration be brought within the scope of the measure? Shall the School Board system be affected? Shall complete control of the police be given to the new county councils? Which of our large towns shall be made counties of themselves? Shall the control of the liquor traffic be dealt with? With all these questions, and others hardly less important, the future must be big, until the Lord Advocate rises to introduce the Bill in the House of Commons. We trust, however, that whatever may be the character of the details of the measure, the Bill will be treated, as in the main the English one was, as a non-party measure,—a Bill of which all parties approve, and in making which as perfect as possible all parties are equally interested.

Special Articles.

LAWYERS AS BANK AGENTS.

It is always made a great grievance by the permanent staff in the large banks, that the best country agencies are given, not to men who have been long in the service, and have worked themselves up, step by step, by slow degrees, and with very scanty emoluments, but to outsiders who have never been behind a bank counter, and who, very likely, did not even

do their own banking business with the firm from which the appointment is received. No doubt this is a very great hardship, and, indeed, in view of the miserable remuneration of bank clerks, and the few good appointments open to the permanent staff, it is surprising that so many gently nurtured and well-educated lads are always to be found ready to enter the service whenever vacancies occur. Pretty strong opinions have been expressed from the Bar, and even from the Bench, in some recent trials of bank officials for peculation, about the miserable emoluments which banks that are making large profits give to officials placed in anxious and responsible positions. In singular contrast with the wretched pay given to subordinates, are the large emoluments of the one or two lucky men who reach the top of the tree, and become managers and secretaries. These officials have very often as large salaries as judges of the Supreme Court. It may be that the existence of these prizes accounts for the ease with which the staff is recruited. It is well known that a fair average of success is not nearly so potent an inducement to youth to enter a profession as one or two large prizes, however small may be the chance of any particular individual obtaining one. Few youths believe that they are only average men. Almost every one expects, when he begins, that if there are one or two prizes at the top of the profession, one of these will fall to his lot. The process of disillusion soon sets in, and the youth is thankful and lucky if he succeeds in securing some minor appointment which yields him a decent livelihood. The advocate, who, ten years ago, was weighing the claims of a chair in one of the Divisions of the Court of Session against those of a Lordship of Appeal in the House of Lords, is glad to take a Sheriff-Substituteship in some outlandish spot at £550 per annum. The divine, who so lately studied the shapings of his calves, and wondered how the bishop's gaiters would become them, is pleased, indeed, to have his faithful services as curate at £60 per annum rewarded with a prison chaplaincy at £250. Young Sawbones, who only the other day was wondering whether the basis of a consulting practice would be best laid by specialization or by a few years of family practice in the metropolis, is glad to be appointed medical officer to a country parochial board. Luckily, in all these

callings, and in others, there are numerous openings for men who have shown only fair aptitude or obtained only a half success. But it is otherwise in the profession of banking. In a large banking-house there are, as has been said, one or two very good things, and hardly anything else. There are, indeed, a few fairly salaried appointments, but their number is very scanty in proportion to the whole strength of the staff, and they cannot be obtained, like Sheriff-Substituteships, parishes, and country practices, by men who are still young. They are open only to those who have already grown grey at the desk. A young bank clerk who wisely waits till he can afford to settle down comfortably before he marries, will probably wait for ever; at best domestic bliss will open to him only after the keener energies of youth have faded in the past.

It is no wonder, then, that bank employés look on with something like indignation whilst, one after another, country agencies are bestowed upon country lawyers, who have the business of banking to learn after they obtain the preferment. Their feelings are akin to what one may suppose those of a body of country procurators would be if an Edinburgh lawyer were sent down amongst them as Sheriff-Clerk or Procurator-Fiscal. The case is a very hard one, but, after all, it is not very easy to blame the bank which makes such an appointment in the face of rival competition. If the R. Bank and the U. Bank have pushing agents known to everybody in the locality in the town of A., what chance of making any headway against them would a youth from the head office of the C. Bank, an entire stranger in the district, have? Y., who has been twelve years in the head office, who is a most accurate and painstaking fellow, and who has been engaged for the last three years to Miss M., wants the appointment, no doubt, and his claims have been pressed upon the directors; but send Y. down to A., and of what use will he be there? He has never been in A., and knows nobody there; he is an Edinburgh man, and west-country clanishness is nowhere stronger than at A.; then, too, this district is an agricultural one, and Y. knows nothing about farming. When the farmers come into the place on the market day, Y. will not be able to talk with them, or, if he does, he will scandalize them by confounding a

gimmer with a wedder. On the other hand, there is W., the local solicitor, who has also applied for the agency. W. is agent for Sir Thomas, the largest proprietor in the district, and for several other landowners and people of influence. Hitherto he has banked with the R. Bank, and no doubt this has taken a number of his clients and of their tenants to the same place. If W. got the C. agency, this business would, no doubt, gravitate towards the C. Bank. Then W. is widely known, he is popular and influential, and is regarded in the district as a thoroughly sound and reliable man. He has dealings with all the farmers, and can talk weather and crops with them by the yard: many of them come to his office to pay their rents, and others he meets at the market, which he attends regularly, for he has several farms in his own hands. Clearly, there is no comparison between Y. and W., if regard be had to the interests of the C. Bank and the likelihood of maintaining and extending its business at A. Accordingly, the directors are obliged, reluctantly, to pass over Y. (whose marriage is again postponed indefinitely), and the appointment goes to W.—to add a third to his already ample income.

But although it is most natural that banks should appoint lawyers as their agents in provincial towns, the arrangement is in some of its aspects an anomalous one. There is no special relation between the business of banking and the profession of the law, more than there is between banking and any other avocation. The lawyer in the large city might just as well be a share-broker as the country lawyer a banker. It is not any peculiar relation between his calling and the business of banking that secures the country lawyer the appointment, but he gets it just because it suits otherwise. There is just as little connection between grocering and keeping a post-office, as between butchering and the like Government employ. But one very often finds the post-office at the grocer's, never at the butcher's. The grocer's *suits* better. So in many ways the minister would just be as appropriate a banker as the lawyer. But then the minister does not keep clerks, he is often away from home, he is obliged to live at the manse, and, if he took to banking, the Presbytery might interfere. In the old days, when banking was a smaller business, these difficulties were

all overcome, and it is not so very long since there were clergymen living who, in their young days, did all the banking business of their parishioners, and—good old souls!—*charged no commission* for doing it. But modern banking has outgrown these patriarchal ways, and so it generally happens that the lawyer is deemed the most suitable person for the bank agency.

It is no doubt a very bold thing for a lawyer who has had no banking experience to undertake the management of a considerable branch. It is like what happened at the commencement of the Volunteer movement, when sometimes a man, quite innocent of any knowledge as to the mysteries of the formation of fours, was suddenly pitchforked into the colonelcy of a battalion. In these circumstances the gallant officer was, of course, entirely beholden to his staff from the regulars. And so the new bank agent is at first entirely dependent upon his subordinates, who have been trained in the business of banking. It is well when this dependence has its term. But, unfortunately, there are some lawyers who, having obtained agencies after they have made a good law business for themselves, continue to devote themselves entirely to the profession of the law, and never apply themselves to acquire familiarity with the details of banking business. In such circumstances the entire control of the interior economy of the bank is in the hands of a subordinate permanent official, who thus acquires powers and responsibilities out of all proportion to his emoluments. Unfortunately it sometimes happens that this wretchedly underpaid official is tempted to take advantage of the command of ready money which he possesses, to plunge into rash speculations to try to better himself, and the result is a case of breach of trust and embezzlement. Those who are behind the scenes know that there are far more of these cases than ever see the light, for not only are the banks often unwilling to prosecute, but the country agent, who has neglected due supervision, and left everything to the cashier or teller, very often pays up himself, and gets the matter hushed up without the head office ever having been made cognisant of what has taken place.

There are other temptations besides that of leaving too

much to subordinates, to which the lawyer banker is exposed. There is, of course, the very obvious risk of being tempted to give too great facilities to his own clients, and especially to give bank credit in order to allow a personal overdraft to be met. But, after all, these risks are not so serious as they seem. The banks look so uncommonly well after their own interests, that an agent who attempted practices of this kind would soon find that in the long run it was very much to his pecuniary disadvantage to have done so. There is a much more serious risk in the temptation to use bank credit as an instrument of monopoly and oppression. The litigant who has a heavy overdraft dare not continue to employ a rival lawyer who commands no banking facilities; and so a client is filched. A client of the banker's has a dispute with a tradesman who has a heavy overdraft from the bank. The unfortunate tradesman dares not show fight, and is obliged to pay through the nose, in case his credit at the bank should be withdrawn. A farmer proposes to retain a portion of his rent, because his fences have not been put in order as agreed to. Very well, he may do as he is advised; but he need not expect that bill for the price of the cattle he is to purchase for this year's grass to be discounted. The law allows a certain indulgence to the debtor. Diligence cannot run against him until decree has been taken, and even after decree the process of charge gives him time to try to make arrangements to meet his liabilities. But the lawyer who commands a debtor's bank account can very often, in his own interest, or that of his client's, dispense with all these delays, and bring his man down in a moment, without giving him any opportunity to try to square the debt. The other day there was a case in Court, where a firm of law agents rendered an account for some couple of thousands due to a client, by a firm trading largely on credit and heavily overdrawn, and coupled this action with an intimation that the firm's bank account was closed, and no further cheques would be honoured. Of course the firm was brought down at once.

We have pointed out some of the dangers to which a lawyer who undertakes a bank agency is exposed. We do not for one moment suggest that lawyers, as a rule, take

undue advantage of the exceptional powers which such an appointment gives them. But the temptations to do so are very great, and there can be no doubt that this does sometimes happen. The number of records, both in the Supreme and the Sheriff Courts, in which improper use of banking influence is attributed, is very considerable, and is, we fear, increasing. The profession of law agent is one, in all cases, of very great trust and responsibility. But by the combination of bank agency with ordinary law business, that trust and that responsibility are very largely increased, and there is no situation in which the honour and interests of the profession more urgently demand the scrupulous integrity of the practitioner.

*THE DECISIONS ON THE CONVEYANCING
(SCOTLAND) ACT, 1874.*

I.

SINCE this Act became law, a little more than fourteen years ago, no inconsiderable portion of the time of the Courts has been taken up in interpreting, at the call of litigants, certain of its sections, more especially those affecting the rights of superiors and the liabilities of vassals; so that at this present time the decisions by which the Act has been followed form no unimportant body of law. Indeed, we do not know any statute of recent date, applicable exclusively to Scotland, which may be said to be so amply clothed with cases.

These cases are so numerous, extend over such a length of time, and the circumstances from which the decisions are evolved are so varied, that at first sight these decisions may seem not to run an even course. We make no apology, therefore, for attempting a review of the cases, with the purpose of ascertaining their bearing, and of classifying the results. We propose also to note any new point of law which has arisen, and which is cognate to the subject in hand.

The more important part of the Act, and that which, as we have already said, has most engaged the attention of the

Courts, is that portion which deals with the rights of superiors and the liabilities of vassals ; but there are other sections—such as the section dealing with the solemnities in the execution of deeds ; that dispensing with the necessity of two notaries and prescribing a form of the notarial docquet ; that abolishing the distinction between burgage and feu-holdings ; that shortening the period of prescription ; that dispensing with the necessity for Bonds of Corroboration in certain cases ; and that removing the limitation on the effect of a decree of mails and duties in a question with a trustee in bankruptcy, as amended by the subsequent Conveyancing Acts of 1879 and 1887—which have all come more or less before the Courts for interpretation, and the decisions on which will also fall to be noted.

Reverting for a moment to the leading sections of the Act,—those affecting superiors and vassals in their respective rights and liabilities,—it may be well to state briefly their purpose. They were passed with the intention of simplifying the form of investiture, by making writs of confirmation unnecessary, and substituting an implied entry, introduced by the statute, and effected by the registration, in the appropriate Register of Sasines, of the vassal's title. The Act also provides a simplified machinery, suited to this altered state of matters, whereby the superior may enforce his rights—which rights, except in form, were to remain intact—it contains enactments prescribing the rate at which casualties may be redeemed or commuted ; and it deals with certain other details arising out of the rights referred to. These various sections may be said, generally speaking, to embrace the 1st to the 9th, and the 14th to the 25th ; but of these the 4th section is the one around which there has been most controversy. Its purport will be recalled to the mind of the conveyancer, more readily than in any other way, by quoting the headings of its various sub-sections, which are,—(1) “Renewal of Investiture abolished,” (2) “Infeftment to imply Entry with Superior,” (3) “Implied Entry not to affect Rights of Superiors to Feu-Duties, etc.,” and (4) “Actions in lieu of Declarator of Non-Entry.”

These sub-sections form the ground-work of the alteration

on the relationship of superior and vassal. Their meaning has always been beyond doubt; but their effect has frequently been the subject of judicial decision.

The change introduced by the abolition of the Writ of Confirmation gave rise to the first litigation under the Act. This was the case of *Skinner and others*, 19th May 1876, which decided what at first sight looks (in contrast with the larger issues which afterwards were submitted for decision) like a point of very minor practice; but which involves a principle, the effect of which is more often overlooked than observed. In *Skinner's* case the superior claimed the right to record in his chartulary, at the vassal's expense, the Disposition, the registration of which effected the statutory entry with the superior. The claim was negatived,—the Lord President remarking, “Nor is there any necessity to intimate any such conveyance to the superior. If no intimation is made, the original feuar continues liable to the superior; but it is not required that any such intimation should be made. The entry is operated by recording the conveyance in the Register of Sasines.” Notwithstanding these plain words, the idea still prevails in some quarters that a superior is entitled to have in his chartulary a record supplied to him by the vassal of his entry,—an idea, no doubt, strengthened by the form of Notice of Change of Ownership under sub-section (2),—for some superiors decline without such a notice, and even on presentation of the recorded conveyance, to recognise the new proprietor as vassal. The Notice of Change of Ownership is provided by the Act for an entirely different purpose, and, if it is not used, there is, unfortunately, no convenient method by which the superior and the new vassal can be made aware of their relationship, and be saved from the trouble which arises from the change.

The next case occurring in point of time, arose out of the implied entry introduced by the Act; but the point involved does not touch, except indirectly, the rights of superiors or vassals as such. The statutory form of Conveyance of lands introduced by the Transfer of Lands Act, 1847, and re-enacted, with certain exceptions, by the Act of 1868, contained a short form of obligation of relief by the disposer, in favour of the disponee, from all feu-duties, casualties, and public burdens;

and that form was declared to have the same meaning and effect ~~as~~^{as} the longer obligation of relief previously in use. The import of the long as well as of the shorter clause in regard to the matter of casualties was that the disponent was bound to relieve the disponent of casualties which had become "due" prior to the latter's date of entry. The term "due," again, had been interpreted to mean casualties of which payment had actually been demanded, for, until a demand had been made, a casualty, under the old law, was neither due nor prestable. The law on this point continued settled and unquestioned until the case of *The Leith Heritages Co. v. The Edinburgh and Leith Glass Co.*, 7th June 1876, decided by Lord Curriehill. Here the Disposition contained the usual clause of relief; and the disponent, after his entry, having been for the first time called upon to pay a casualty, sued the disponent for relief. The casualty had only become due and payable, under the law as it was then understood, on the demand being made for it; but the disponent claimed relief, founding on the 4th section of the Act, which, it was argued on his behalf, had altered the previously existing law. The Lord Ordinary dismissed the action, and his judgment was acquiesced in. Lord Curriehill's judgment on this particular point has been overruled in another case (see *infra*, *Straiton Estate Company Ltd. v. Stephens*); but the *Leith Heritages* case is interesting and instructive, as containing an exposition by his Lordship of the law affecting such obligations of relief as it was then understood. The learned judge in his remarks in this case sounded the first note of the controversy, of which more was to be heard afterwards, as to the rights of superiors to successive casualties in respect of successive implied entries under the Act.

And this brings us to the first case in which it was attempted to set up, by force of the statute, a right to a casualty which would not otherwise, under the old law, have been demandable.

But as the cases bearing on this particular point form a series, the decisions in which have varied with the varying circumstances, it will be more convenient, and allow us to arrive more clearly at the results, if we take them, not in their chronological order, but as they either (a) have not

modified, or (b) have modified the rights and liabilities of superiors and vassals as they formerly existed, and if we add, under this second branch, a note showing how far the decisions falling under it have in their turn been modified by statute.

And under the first head the earliest case is that of *Morris v. Brisbane*, 21st February 1877. This case arose ostensibly under the 15th section of the Act, which empowers the vassal to redeem the casualties of his feu. The effect of that section, however, was not in dispute; but in order to ascertain the amount payable by the vassal on redemption, the Court was called upon to decide a claim by the superior for more than one casualty in respect of several transmissions and the implied entries following thereon. The original Charter of the feu contained a prohibition against subinfeudation and Dispositions with base holdings, fenced with a clause declaring that all subaltern rights granted in contravention of it should be null and void. After several transmissions, the feu became vested in Morris, whose title was duly recorded, and he elected to redeem the casualties. The superior (the original feuar being still alive) claimed a casualty in respect of Morris' implied entry under the Act. Now there were in practice two well-known sets of clauses in use for, on the one hand, insuring the recognition, and, on the other hand, of providing for the extension, of the superior's rights in the event of the transmission of the *dominium utile*. The first of these sets of clauses (of which there is an example in the case of *Colquhoun v. Walker*, 17th May 1867) had for their purpose the prohibition of subinfeudation and Dispositions with a base holding, with, and sometimes without, an irritant and resolute clause attached; and the other set (of which there is an instance in the more recent case of *Hervey and another (Morrison's Trustees) v. Webster and another*, 16th May 1878) contain a similar prohibition, accompanied always with a declaration that on each transmission the vassal is to be bound to present his title for confirmation, and to pay a casualty or composition—generally a fixed sum—within a certain and limited time from the date of his entry to the lands, even although the last-entered vassal be then alive. The one set of clauses prevented, and in feus given off prior to the passing of the Act still prevent, permanent subin-

feudation, as distinguished from alienation with merely an alternative holding; but, as was decided in *Colquhoun's* case (where, however, there was no irritant clause attached to the prohibition), they did not entitle the superior to absolutely refuse confirmation of the vassal's title; and it was never suggested that they entitled him to exact any composition or casualty on such confirmation unless it was otherwise due, *i.e.* unless it was due by paction or at common law. The other set of clauses, which can now only be found in the older feu rights, have a different effect. They create a substantial pecuniary obligation on the vassal in favour of the superior, and in practice they have been recognised as entitling the latter to a casualty or a fixed composition, as the case may be, on each transmission of the feu. In *Morris'* case it was argued on the part of the superior that the entry implied by the registration of the vassal's title had, in conjunction with the clause prohibiting subinfeudation and Dispositions *de me* contained in the feu-charter, rendered a casualty due, even although the original feuar was still alive. The Court (Second Division) affirming Lord Rutherford Clark's judgment, negatived that contention; and held that the 4th section of the Act did not, even in conjunction with the prohibition referred to, entitle the superior to a casualty on each transmission.

The decision in *Morris'* case settles the law applicable to the circumstances out of which it arose; but in other two cases, and under a different set of circumstances on each occasion, claims were advanced on behalf of the superior for double casualties, and were repelled.

The first of these cases is *Neill v. Douglas' Trustees*, 15th July 1882. The facts submitted to the Court in this case were, shortly, these. Alexander Lang, who was infeft and entered in the lands of Overton, disposed them in 1817 to John Lang, and after various transmissions (on none of which was an entry taken with the superior), the lands came, in 1850, to be vested in Elizabeth Douglas, who was infeft, but remained unentered until the Act came into operation, when, by the force of its provisions, the fee, to use the old expression, "became full" in her person. Elizabeth Douglas died in 1882, leaving a Trust-Disposition and Settlement, on which,

however, her trustees did not take infeftment. The superior raised an action against the trustees for two casualties—one as exigible on Miss Douglas' implied entry, and the other as exigible from the trustees as singular successors. The Lord Ordinary (Fraser) found the superior entitled to one casualty, being that due in respect of the entry of Elizabeth Douglas in 1874; but as the trustees were not infeft, he found that there was no casualty due by them; and the rubric of the case bears, that on payment of the casualty decerned for, the heir of Elizabeth Douglas was entitled to be entered on payment of relief duty. This latter part of Lord Fraser's judgment anticipates, if we may say so, the judgment of the Court in another case, where the right of an heir to enter under similar circumstances was submitted as a special issue. *Neill's* case was not carried further. In it the defenders stated a defence separate from, and independent of, that open to them under the Act, which does not seem to have been dealt with by the Lord Ordinary. It was, that Elizabeth Douglas having died before the demand for a casualty in respect of her implied entry was made, the right to the casualty fell and did not transmit against her representatives. Now, although this defence, as it appears to us, is well founded, and would have been a sufficient answer to a claim against Miss Douglas' trustees *qua* representatives, it would not have availed the defenders to the effect of allowing them to escape from payment of a casualty altogether. For, although sub-section (4) does away with the right of action formerly existing by which a superior, being entitled always to have fee full, could pursue a declarator of non-entry, it provides an equivalent in the shape of an action of declarator and payment, by which a superior can enforce his right to the casualty which may be due at the date of his action. In the circumstances, as they existed in *Neill v. Douglas*, two courses were open to the defenders. Either the trustees might have taken infeftment on the Trust-Disposition and Settlement—in which event they would undoubtedly have been liable to a casualty as singular successors—or they might, while they themselves remained uninfeft, have put forward Miss Douglas' heir; but he, as being a singular successor to the last-entered vassal who had paid a casualty, would only have been received on payment of a

year's rent. In neither case, therefore, could the trustees have escaped payment of the single casualty which was found due.

The other case referred to as negating a claim for a double casualty is that of *Mounsey v. Palmer*, 20th November 1884. Here Oliphant's trustees, who were infest and entered as proprietors of subjects in Candlemaker Row, Edinburgh, sold the property to James M'Caskie, who conveyed it in 1867 to James Miller, who in 1875 disposed it to the defender Palmer. On each of these transmissions infestment followed—the infestment in existence at the date when the Act came into operation being that in favour of James Miller. The last surviving trustee of Oliphant died in 1871, and the property then fell into non-entry. In 1883 the superior (Mounsey) raised an action against the vassal (Palmer), who was then proprietor of the subjects, for payment of the casualty then due; and on payment being made a receipt dated 9th June 1883 was granted in the following terms:—“Received from Mr. David Palmer, corn merchant, Cowgatehead, Edinburgh, the sum of £60 sterling, in full of the casualty payable for subjects, 90 Candlemaker Row, Edinburgh, on the death of the last entered vassal in October 1871, viz. R. Hunter, advocate, the last surviving trustee of the late Charles Oliphant, W.S., conform to summons at Mr. Mounsey the superior's instance against Mr. Palmer, signeted 20th April last, which sum of £60 is accepted in full of the casualty sued for in said summons. (Signed) Campbell & Somervell, agents for Mr. Mounsey.” James Miller (the vassal whose infestment was impliedly confirmed at the passing of the Act) was alive at the date when the summons mentioned in the receipt was signeted, but died on 5th June 1883, i.e. before the composition was paid and the receipt therefor granted. On James Miller's death the superior raised an action against Palmer for payment of another casualty, the claim therefor being maintained on the ground that James Miller was the vassal on whose entry the casualty referred to in the receipt was paid, and that the defender was the vassal entered at the date of the new claim, subject to the superior's right to demand a casualty under sub-sec. (2) of sec. 4 of the Act. The defender answered

that, the action of 1882 having been raised against him as proprietor infekt and entered for the casualty due on the death of the last survivor of Oliphant's trustees, and that, having paid that casualty, he was vassal infekt and entered with the superior conform to his infektment and the said receipt. The Lord Ordinary (Fraser) gave effect to the defender's contention; and the Court (First Division) adhered. In this case it was held that the receipt which we have quoted, having been given upon an action raised not against Miller but against Palmer the proprietor, it was a discharge of the claim against him; and that the superior could not go back upon the claim which had emerged during Miller's proprietorship for the casualty which had undoubtedly become due on the death of the last survivor of Oliphant's trustees. For not only had that claim been included in the discharge operated by the receipt, but, by allowing the claim to lie over until after Palmer had purchased the property and become infekt in it, the superior had lost his right to insist on it.

In *Campbell v. Stuarts*, 11th December 1884 (which will be adverted to afterwards, when we come to deal with another branch of the subject), a claim for a double casualty was advanced, but was departed from in consequence of the decision in *Mounsey's* case.

On the authority of these decisions it may now be taken as settled law that, in the absence of a contrary provision in the feu right, a superior has no claim, such as it was at one time contended the statute created, to a number of casualties corresponding to the number of transmissions and infektments (and consequent implied entries) which have taken place between the time when a casualty first became due—a time corresponding to that when, under the old law, the lands would have fallen into non-entry—and the date when a demand for a casualty happens to be made.

We now proceed to notice a case, and that the only case at least which went to judgment, in which it was attempted to set up an unfeudalized title as a bar to the entry with the superior of the heir of the ancestor last infekt, and from whom that unfeudalized title flowed. This is the case of *The Duke of Hamilton v. Guild (Potter's Trustee)*, 6th July 1883; in which the First Division affirmed Lord Kinnear's judgment.

The facts of this case were as follow :—Lewis Potter was in 1865 infest in the lands of Netherhouses, and was entered with the superior. In 1878 his estates were sequestrated, and Mr. Guild was appointed and confirmed trustee thereon, but his title as trustee continued to stand on his unfeudalized Act and Warrant. Lewis Potter died in 1881 ; and in 1882 the Duke of Hamilton raised an action of declarator and payment against the trustee concluding for payment of the casualty which it was contended became due on the death of Lewis Potter. The trustee put forward the heir of Lewis Potter, who was willing to enter, and who was accordingly sisted as a party to the action. The Lord Ordinary, in an exhaustive judgment, in which the law of the case is fully stated, assoilzied the defender, holding that Mr. Guild's unfeudalized Act and Warrant was no barrier to the entry of the heir of Lewis Potter ; and the Court unanimously adhered.

In this case the unfeudalized title was a trustee's Act and Warrant of Confirmation ; and it is needless to remark that the decision would inevitably have been the same (as is shown, indeed, in the case next noted), had the trustee's title been an unrecorded Disposition granted by Lewis Potter. The unanimous decision of the Court must therefore be taken as, once for all, settling the law applicable to either of these sets of circumstances.

And here it will be convenient to examine the decision in the case of *Hope v. The Duke of Hamilton*, 6th July 1883, not only because it was decided on the same day, and was ruled in one of its branches by Potter's case, but because the decision on the other branch of the case, in which a separate judgment was given, forms a fitting introduction to the decision in the case of *Mackintosh v. Mackintosh* (*infra*), and to an interesting and important series of decisions on the doctrine of radical rights, and their operation and effect in questions between superiors and vassals, as affected by the Act. In the case under examination, Admiral Sir James Hope, whose title to the lands of Carriden stood on a Precept of *Clare Constat* with infestment thereon, conveyed them by ante-nuptial Contract of Marriage, dated in 1877, to himself and his intended wife and the longest liver of them in conjunct fee and liferent, for her liferent use allenary, and to

the child or children of the marriage in fee. On that Contract infestment was taken in favour of the spouses for 1881, leaving a Trust-Disposition and Settlement (on which, their respective rights as liferenter and fiar. There were no children of the marriage; and on Admiral Hope's death in however, his trustees did not take infestment), his heir-at-law, Miss Hope, claimed to be received as such by the superior of the lands. To this claim the superior advanced two separate answers, each involving a distinct question of law. The first, which was apparently stated during the discussion, was that the destination in the Marriage Contract introduced strangers to the succession; that the registration of that deed formed a new investiture; and that the entry operated by such registration being equivalent to a Charter of Confirmation enfranchising for the first time the strangers so introduced, the superior was entitled to a casualty; and the second answer was, that Admiral Hope having left a settlement conveying the lands to trustees (who, by the way, in their turn had conveyed them to the pursuer, who did not, however, use their conveyance for obtaining infestment), the pursuer was liable for a casualty as a singular successor. The Lord Ordinary (to whose judgment the First Division adhered) dealt with these two answers at length; but in consequence of the decision in Potter's case, the pleas founded on the second answer, although not departed from, were not specially insisted on in the Inner House, and the case resolved itself into one for judgment on the superior's claims as disclosed in the first answer only. The essence of the superior's plea under this head was, that the registration of, and consequent entry which followed on, the Marriage Contract of 1877, operated under the Act as a change on the investiture; and this plea was even pushed to the length of founding an argument to the effect that, in consequence of such change in the investiture, Miss Hope's service as heir-at-law to Admiral Hope, as infest under the Charter on which his title originally stood, did not effectually vest the lands in Miss Hope. The Lord Ordinary declared that view to be untenable: and he adds—"The registration appears to me to have had no other effect in law except that of infesting Lady Hope in a bare liferent, as Sir James was already infest in the fee; and the effect of a conveyance by a

proprietor infeft, in the terms quoted, is too well settled to be the subject of argument. It left the fee in Sir James precisely as it was before, and gave a bare liferent to Lady Hope and a right of succession to the children." Their Lordships of the First Division concurred in the views of the Lord Ordinary; and the claim of the superior was negatived.

It seems to us that we correctly estimate the result of this decision if we say that the radical right remained in Sir James Hope, burdened with the liferent provided to his wife and the *spes successionis* created in favour of the children of the marriage by the Marriage Contract of 1877.

In the discussion in *Hope's* case a rule of law other than that arising out of the doctrine of the radical right was referred to and commented on by the Court; and, as a preface to the consideration of the decision in *Mackintosh's* case, an examination of that rule and its effects will here find a proper place. The Lord Ordinary in his opinion says: "If Sir James could be held to have entered of new, it would not aid the defender's [the superior's] case, because the only effect of the alteration would be to take the fee to himself and the heirs of his marriage, instead of to himself and his heirs general; and it has never been held that where an investiture is altered in the lifetime of the vassal, and the fee taken to him and the heirs of his body, or the heirs of a particular marriage, or any other limited class of heirs, the superior could claim anything but relief upon an entry." This question of the rights of a successor, under a destination with a limited series of heirs, to entry on payment of relief duty has been frequently before the Courts. It may be taken as settled that a superior is bound, under the reservation to be afterwards noted, to enter the institute or other heir of entail, or the first, or any, of a series of heirs of provision, if he be also the heir-at-law of the entailer or granter of the Disposition as the case may be, and if the state of his author's title warrants it, on payment of relief duty; and that a superior who has recognised a tailzie, or enfranchised a new order of succession by granting a Charter by progress under it, is precluded, under the reservation referred to, from demanding more than relief-duty from the heirs of provision under the new investiture. As, however, the superior is

not bound to enfranchise, under a new order of heirs, a stranger to the superseded order of succession, the reservation referred to is, that when the first successor who is a stranger to the superseded order of succession presents himself for entry, the superior shall be entitled to a casualty. The series of cases settling these points begins with *Lockhart v. Denham*, 10th July 1760 (M. 15047), and ends with *Marquis of Hastings v. Oswald*, 27th May 1859 (21 D. 871); while the recent case of *The Governors of George Heriot's Hospital and others*, 31st October 1884 (in which the institute of the new investiture, being a stranger, having paid a casualty, a subsequent heir was found entitled, even although the full destination had not been repeated in the first Charter by progress, to entry on payment of relief-duty) illustrates their application. Nowhere, perhaps, is the law on these points more tersely stated than in *Mackenzie v. Mackenzie*, 4th July 1777 (M. 15053), the report of which bears: "The Lords found, that a superior of entailed lands was obliged to enter the heir of entail, who in this case was likewise the heir of the former investiture and lineal successor, in the lands on receiving a *duplicando* of the feu-duty; and was not entitled to demand from him a year's rent or other composition; reserving to the superior, and his successors in the superiority, any right which they may have to a year's rent or other composition on the entry of any future heir of tailzie not an heir of investiture prior to the tailzie." We may take it, therefore, that the pursuer in *Hope's* case would have been entitled to an entry as heir under a new investiture created by Admiral Hope's Marriage Contract, on payment of relief-duty, and that the superior would have been bound to grant that entry; but as there were no subsequent heirs of the investiture, except the heirs-at-law of the vassal so entered, the reservation in *Mackenzie's* case would have been unnecessary.

The cases noted in the preceding paragraph referred to heirs taking either under Deeds of Entail or other similar deeds, having for their effect the substitution or the perpetuation of a conventional, as distinguished from the legal, order of succession on the lands. But in the case of *Mackintosh v. Mackintosh*, 5th March 1886, the question came up under the conditions introduced by the Act, and where on a

Disposition and Settlement, which was one in fee simple, infeftment had followed. Here Æneas Mackintosh, proprietor of and vassal infeft in the lands of Dalmigavie, disposed them *mortis causâ* to Campbell Keir (afterwards Campbell Keir Mackintosh), who was his nephew, and who, if Mr. Æneas Mackintosh had died intestate, would have been one of his heirs portioners, and as such entitled to succeed to one-half of the lands disposed. The donee completed his title by Notarial Instrument, duly recorded in April 1882. The superior thereupon raised an action against Mr. Campbell Mackintosh as singular successor infeft in the lands, and by force of the statute entered with him as such, for one year's rent in name of casualty. The Court (First Division), reversing Lord Trayner's decision, held, on a review of *Mackenzie's* case and others of that class, that Mr. Campbell Mackintosh did not lose his right as heir *aliogui successurus* to one-half of the lands to be entered on payment of relief-duty *quoad* that half by taking the lands under a singular title; and that his infeftment, followed by the implied entry with the superior created by the Act, did not deprive him of his common law right. This case of *Mackintosh* is of importance as applying the rules referred to, to a title of the description mentioned, and is to be carefully distinguished from the case of *Ferrier's Trustees v. Bayley*, and other cases of similar import, decided in 1877 and 1878, and to be afterwards noted.

We now turn to the set of cases before adverted to as dealing with the provisions of the statute in conjunction with the existence of a radical right, which it has been held excluded their operation. These cases are three in number, but two of them were decided as one; and they will be found under the titles and dates of *The Marquis of Huntly and his Trustees v. The Earl of Fife*, 15th December 1885, and *The Earl of Home v. Lyell* and *The Earl of Home v. Jamieson*, 9th December 1887.

In the *Marquis of Huntly's* case the facts are exceedingly simple. The title of the Marquis to his lands of Dornoch and Inverenzie stood upon a Decree of Special Service in his favour as heir of entail to his father, duly recorded in the Register of Sasines in 1866, but on which an entry was not expedite with the superior. Between 1876 and 1884 certain deeds were

executed for disentailing and re-entailing the lands, but these deeds did not affect the investiture. In 1882, however, the Marquis executed a Disposition of the lands in favour of certain trustees, which created a trust practically for creditors with reversion to the granter. On that Disposition the trustees were infest; and by the operation of the Act were entered with the superior. In that state of the title the superior claimed a casualty from the trustees, as singular successors entered with him, while the trustees contended that relief-duty only was due. The points at issue are thus stated by Lord Kinnear in his judgment: "The question in these circumstances is, Whether the casualty now payable to the defender [the superior] is the relief-duty of one penny Scots for the entry of the heir [the Marquis of Huntly], or a year's rent of the lands as composition for the entry of a singular successor? The question depends upon whether the Marquis is still proprietor infest in the subjects in question, or whether he has been divested in favour of his trust disponees." His Lordship adds, that if the Marquis is undivested, he is still the vassal infest and duly entered with the superior; while, on the other hand, if he is divested, he can have no title to interpose between the superior and the trust disponees, who are then the vassals entered with the superior. On a review of the authorities, his Lordship held that the radical right remained in the Marquis. "It follows," he says, "that the Marquis of Huntly is still the vassal infest in the lands, and as such he is entitled to protect his estate by tendering payment of the relief duty, which is undoubtedly exigible, and which has not been paid." His Lordship's views as to the operation of the Act, in the state of the titles, will be found summed up in two passages. "The defender" [the superior], he says, "maintains that the implied entry of the trustees by the operation of the Conveyancing Act entitles him to payment of a composition, because trustees for creditors, under the old law, could not have obtained an entry upon other terms. . . . He must show that he could have required the trustees to enter under the prior law, and he could not have done so if the fee was already full." The Lord Ordinary decerned against the superior, and his judgment was acquiesced in.

In the case of *The Earl of Home v. Lyell and others* (in which two actions were conjoined) the facts are of a more complex character than were those in the *Marquis of Huntly's* case, and they will be found stated at full length in the reports; but divested of details which do not affect the *ratio decidendi* and a statement of which is not necessary to the comprehension of the points at issue, they may be stated thus:—Charles Lyell (1) was proprietor of the lands of Kinnordy, and his title stood on a public infeftment, the Charter of Confirmation being dated 1782. In 1836 he executed a *mortis causa* Trust Disposition and Settlement in favour of his children *nominatim*, and the survivors and survivor of them in trust, and of his heir-at-law for the time in fee. The primary purpose of the trust was the division among the children, and the survivors and survivor of them, of the rents of the lands, while the ultimate destination was that, if the last surviving child were the truster's heir-at-law, the trust should cease and determine, or, if that should not happen, then that on the death of the last survivor of the children, and the consequent termination of the trust, the lands should fall to the truster's heir-at-law at the period of that event, with power to him to make up titles. The Trust Deed contained the ordinary powers of administration, with a prohibition against alienation. The object and effect of the trust so created is explained by Lord Kinnear in his opinion in these words: "The trust is created for the sole purpose of making provision, out of the rents of the estate, for the children of the truster; and upon the death of the last child, who shall not be the heir-at-law, the trust is to come to an end, and the right of the heir-at-law is to become absolute." On the death of the truster, in 1852, his eldest son, Charles Lyell (2), completed his title as heir under the then existing investiture by Precept of *Clare Constat* and infeftment; and in the same year (but whether of a prior or a later date does not appear, nor is it essential), the eight surviving children took infeftment on the Trust-Disposition and Settlement in their favour. On the death of Charles Lyell (2), in 1875, the superior brought an action of declarator and for payment of a casualty against the last surviving trustee as a singular successor infeft, and consequently

entered by the operation of the Act,—in answer to which the heir-at-law of Charles Lyell (2) was put forward as willing to enter. In the arguments as reported, and in the opinions of the judges, the cases bearing upon the construction and effect of deeds of the class under consideration, and upon the reserved rights of the granters and their heirs, and the rights of the disponees, are mentioned and commented on; but it is sufficient for our purpose to know that the Court (First Division—adhering to Lord Kinnear's judgment) held, that the radical right remained in the truster's heir-at-law, upon whose title the Trust Deed was merely a burden of the nature of a liferent; that on his death the lands passed into his *hæreditas jacens*; and that they could be taken up in turn by the succeeding heir-at-law. Consequently, as in the *Marquis of Huntly's* case, the superior's claim for a casualty was excluded.

In the conjoined action the same principle was applied, the only variation of the circumstances being that, in it, the trust was one for behoof of creditors in the first instance.

These cases contain, within themselves, a valuable review of the law relating to radical rights; and, so far as the operation of the Act is concerned, they decide conclusively that where such a right exists in the granter of a deed on which infestment has passed and an implied entry has taken place, or in the heir-at-law of such granter, the right of the superior to a casualty is excluded.

It only remains for us to note under this branch of the subject the case of *The Magistrates of Elgin v. The Highland Railway Company*, 20th June 1884, in which it was decided that the Lands Clauses Consolidation (Scotland) Act, 1845, was not altered by the Conveyancing Act of 1874. The railway company, under their compulsory powers, took a portion of lands which were held of the town of Elgin as superiors. The Disposition to the company was taken in the form prescribed by the Lands Clauses Act, and was duly recorded. The magistrates thereupon demanded a casualty from the company as entered vassals, by force of the statute of 1874; but the Court (First Division) held that there was no relationship of superior and vassal existing between the town and the company; that the claim for a casualty was

excluded by the 126th section of the Lands Clauses Act; and that the claim of the superior of lands taken by a railway or other company under their compulsory powers resolved itself into one of a different nature from that attempted to be enforced in this case.

(To be continued.)

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THE POWERS OF LICENSING MAGISTRATES.

A GOOD deal has been made of the recent judgment of the English Courts in the case of *Sharpe v. Wakefield* and others (21 Q. B. 66, *aff.* 15 Dec. 1888, 37 Weekly Reporter, 187), a decision which is supposed to have an important bearing upon the proposals for a change in the licensing laws and the vexed question of compensation to publicans. The import of the decision, however, has been much misunderstood, and its effect has been greatly exaggerated. It decides nothing in fact beyond what has always been understood by the legal profession to be the law, viz. that magistrates have full discretion to grant or to refuse the renewal of any particular licence, and that the "vested interest," if any, of the publican is a moral and not a legal one. The facts of the case may be very shortly stated.

The licensing justices of the Kendal division of Westmoreland refused to renew the licence of the Low Bridge Inn, Kentmere, on the grounds of "the remoteness of the inn from police supervision, and the character and necessities of the neighbourhood." The owner of the premises appealed to Quarter Sessions. The Court of Quarter Sessions, after hearing evidence on these subjects, upheld the order of the justices, and dismissed the appeal. A case was asked on the ground that under the Licensing Acts 1828, 1872, and 1874, neither the justices nor the Court of Quarter Sessions had jurisdiction to refuse a licence by way of renewal on these grounds. A case was accordingly stated for the opinion of the Court of Queen's Bench by the chairman of the Westmoreland Quarter Sessions. The question for the opinion of the Court was whether or not the licensing justices for the Kendal division and the Court of Quarter Sessions had such jurisdiction.

The Divisional Court found, and the Court of Appeal affirmed the determination, that "the discretion of the justices as to granting or refusing a licence by way of renewal, under the Licensing Acts 1828, 1872, and 1874, is absolute, provided it be exercised judicially; and that the situation of the house as regards police supervision and the requirements of the neighbourhood are matters which the justices have a right to consider in deciding whether to grant or refuse a licence by way of renewal under these Acts."

We repeat that this decision is entirely in accordance with what has always been understood to be the law by Scottish practitioners, and it is not quite easy to understand the commotion which it has excited in England. It appears, however, that the decision is not in accordance with some expression of opinion to which the Solicitor-General for England is said recently to have given public utterance, and which had been popularly accepted as a correct statement of the law.

Whilst the decision effectually disposes of the extravagant contention that the publican, or rather the proprietor of the public-house premises, has a vested proprietary right in his licence, it does not go so far in the contrary direction as has been generally supposed. It has been represented that the effect of the decision is to give the magistrates powers of so absolute a character that they may refuse licences *per aversionem*, and virtually enforce prohibition of the liquor traffic. But the Acts give them no such authority. They must consider each application upon its merits, and exercise their discretion upon each individual case. They would not be considering the applications or exercising their discretion if, before addressing their minds to the circumstances of each particular case, they arrived at a general resolution that no licences at all were to be granted. That this was the view taken by the Court is made perfectly clear by the terms of the opinions delivered in the Divisional Court. Mr. Justice Field said:—

"I had long supposed that no proposition of law was better established than that the justices have an absolute discretion, by which I mean an extremely wide discretion, to be exercised, of course, as discretion is in every case to be

exercised, in a judicial manner, as to the granting of new licences. I have now examined the subsequent statutes and decisions, and I am of opinion that they have not in any way altered the law as to the discretion of the justices, whether as to granting a licence for the first time or a licence by way of renewal." Again: "For the very reason that the discretion of the justices under the statute is absolute, the Court will see that their statutory jurisdiction is exercised in a judicial manner and in accordance with the law. They must hear and decide each particular case. They must not impose illegal conditions upon applicants for licences."

Mr. Justice Wills was quite as emphatic as to the necessity of the magistrates exercising a particular discretion as to each case on its merits:—

"It is, I think, impossible to contend that there was by the Act of 1828, 9 Geo. IV. c. 61, any limitation upon the absolute discretion of the justices, when applied to for a licence, to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case. I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand—as, for instance, when the justices refused the licence because the applicant had not taken out a spirit licence (*Reg. v. Sylvester*, 2 B. & S. 322), or where they had laid down a general rule that they would grant no more licences in the locality (*Reg. v. Justices of Walsall*, 3 C. L. R. 100). In such cases there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat."

The only matter which occasioned any real difficulty in the English Courts was certain provisions of the Acts of 1872 and 1874 in regard to the attendance at the Licensing Court of applicants for renewals. By section 42 of the former Act it is provided, that the applicant "for a renewal need not attend in person at the general annual licensing meetings, unless he is required by the licensing justices so to attend." Then section 26 of the Act of 1874 sets out section 42 of the Act of 1872, and provides that the requisition for the personal attendance of an applicant for a renewal shall not be

made by the justices, "save for some special cause personal to the licensed person to whom such requisition is sent."

It was contended, and with some force, that these provisions, read together, made it clear that in the view of the Legislature a man was not to be deprived of his licence except for some reason "personal to himself." Clearly the justices cannot refuse to renew a licence without giving the applicant for renewal an opportunity of being heard, and yet they are not to send him notice to attend except for some reason "personal to himself." This seems to imply that renewal can be refused only on some ground "personal" to the applicant. To this contention it was replied that to give such an effect to the provisions of the Acts of 1872 and 1874 would be to construe these Acts as having, in this incidental way, effected a complete revolution in licensing, by excluding from the purview of the magistrates all such considerations as situation, locality, character of premises, etc., which, under the Act of 1828, they had always taken into consideration.

To this latter contention the Court hearkened. Mr. Justice Wills said :—

"I am not sure what the provision does mean, but I am quite sure it does not mean that a renewal of a licence cannot be objected to on any ground but one personal to the applicant, and that the repeal of a most important discretion, absolutely necessary for good government and administration, has not been effected in this roundabout and bungling fashion. There are an abundance of cases upon which it is just as necessary to refuse to renew a licence as to grant a new one where the personal character of the applicant may have nothing whatever to do with the objection. Suppose, for instance, that a street, once perfectly respectable, becomes full of brothels and thieves' lodging-houses. The action of the magistrates may be just as necessary to prevent the renewal of a licence in respect of a public-house in such a locality as to refuse one in the first instance, and cases of a like kind must be perpetually occurring."

A like opinion was expressed by Lord Justice Fry in the Court of Appeal :—

"I confess that the only words that have caused me perplexity in this case are those words in section 26, 'personal

to the licensed person.' I think, however, that it is impossible to suppose that if the Legislature had intended to introduce such a revolution in licensing law as to limit the discretion of justices in applications for renewal to matters strictly personal, it would not have done so explicitly. It would, I think, be straining those words far too much to hold that they effected such a revolution."

Had the question arisen in Scotland, the difficulty which pressed upon the English Courts would not have been experienced. Section 15 of Dr. Cameron's Publicans' Certificates Act of 1876, it is true, assimilates the Scottish to the English rule, in so far as it provides that applicants for renewal need not attend the Court unless they receive notice from the magistrates to do so. But there is no provision in the Scots Acts which directs that the justices shall give such notice only for some reason personal to the applicant. Otherwise the argument, the decision, and the grounds upon which it proceeds, seem as applicable in Scotland as in England.

THE DISCRETION OF EDUCATIONAL GOVERNING BODIES.

WE report this month a decision of Sheriff-Substitute Armour upon a point which, in view of the bursary system set on foot by the Educational Endowments Commissioners, is of some interest and importance. A scheme for the administration of an endowment, framed by the Commissioners, provided that the bursars should be "children whose parents or guardians are in such circumstances as to require aid for giving them higher education." The School Board, who were the governing body of the endowment, refused to award a bursary to a child who was first in the competition, on the ground that, in their opinion, the circumstances of her parents were not such as to require it. An action was raised against the School Board, and the Sheriff-Substitute has decided in favour of the child. We are unable to follow the learned Sheriff's reasoning. He seems to hold that the governing body have no right to look to the particular circumstances of individual families, provided the families belong to the rank

of life which makes them suitable recipients of a bursary. He thinks that there might have been a good deal to be said for the view of the governing body if the proviso had run—"where parents or guardians, *in the opinion of the governing body, etc.*" In our view this is precisely what the scheme was intended to provide, and Sheriff Armour in another passage seems to admit this: "The governing body, no doubt, are judges, in the first instance, as to whether a parent falls within this class; but they are to decide this question as a question of fact." Now, if the governing body are the judges, it would appear to us that the question is clearly one as to whether the family is, "in the opinion of the governing body, etc.," because the question must always be one of opinion. Sheriff Armour seems, however, to draw what we deem a quite untenable distinction between questions of opinion or discretion and questions of fact. He says, "The governing body being bound to treat the question as one of fact, and not discretion, there is necessarily an appeal from their decision." But surely a question may be one of discretion, although the exercise of that discretion may require the ascertainment of a matter of fact. Dozens of instances suggest themselves where matters involve at once questions of fact and of discretion. It is absolutely in the discretion of the master of hounds to hunt or not to hunt; but his determination will depend entirely upon his conclusion upon the pure question of fact, whether or not the ground is too hard for hunting. Again, the question whether ice will bear is a simple question of fact; but it is in the exercise of his discretion that A. thinks it will, and steps on, and B. thinks it will not, and stays off. We do not understand how any governing body can be judges of the question, whether the circumstances of a child render it a suitable recipient for a bursary, without their exercising a discretion in the matter. In our opinion, a prudent governing body would not look minutely into the circumstances of each particular family in awarding the bursaries, provided, of course, that the children all belonged to the humbler classes; and we believe that they would be acting entirely in accordance with the intendment of the scheme in refraining from doing so. But it does not follow that the governing body may not, if they think fit, adopt a more anxious system of administration. We doubt

if it was intended by the Commissioners that the decision of the governing bodies in these details of administration should be reviewed in a Court of law; and we cannot follow the Sheriff-Substitute's contention, that because a matter of fact is involved, therefore the decision of the governing body must be subject to review. An interesting aspect of the question does not seem to have been considered, viz. whether the governing body, if they meant to refuse to award the bursary to the child, ought not to have excluded her from the examination?

Correspondence.

THE SYSTEM OF EXTRAJUDICIAL EXPENSES.

(To the Editor of the *Journal of Jurisprudence*.)

SIR,—The article on the System of Extrajudicial Expenses, in the January issue of the *Journal of Jurisprudence*, directs attention none too soon to a matter of great importance, not only to the smaller and somewhat despised section of the community known as "agents," but also, and, I believe, in a much greater degree, to that larger section known as "litigants."

Any system of taxation of accounts which results, as the article in question truly states, in a great deal of expense, which ought in all fairness to fall upon the unsuccessful litigant (the wrongdoer), having to come out of the pocket of the party whom the Court has found to be in the right, must surely be wrong and unjust. It is urged that the present system keeps down litigation. I admit this—with a certain limitation. It does tend to discourage *honest* litigation, but it encourages the worst class of litigant, viz. the litigant who is in the wrong, and knows he is in the wrong. A. has a just claim of £50 against his neighbour B., who scarcely troubles to pretend that he has a defence, but only threatens that he will put every obstacle and expense in the way of A. before he pays. A., aware of this, and having already, perhaps, smarted under the system of "Extrajudicial Expenses," gives up his claim rather than have the worry and expense of a litigation before he can obtain judgment for the amount due

to him. Or, again, A. does raise an action for the amount: the defender after a time capitulates, and sues for terms, which A., being a peaceable man, is willing to consider—all the expenses of negotiating a settlement must come out of A.'s own pocket.

I also fear that the present system tends—at least amongst a certain class of agents—to litigation being conducted in a perfunctory and scamped manner. Now all scamped work is bad, but scamped litigation is an abomination and an instrument of the Evil One.

The agent conducting the case, knowing his client to be a near man, and also unwilling to lose him through the presentation of that most unwelcome bill of Extrajudicial Expenses, pares down the expenses to such an extent that the case is not thoroughly mastered, and is presented to the Court in a slipshod and slovenly manner. Hence disaster, most unmerited disaster, to the client. In a word, the present system discourages a policy of "Thorough," which in law, as in every other pursuit in life, is half the battle.

Now, this being the state of matters, what is the remedy? It may be confessed at once that neither agents nor litigants can compel a charge at once. The auditor is the judge, and, as the Court has, upon good grounds, implicit confidence in the auditor's judgment, it is almost impossible to appeal with success against his decision. Nor is it desirable that appeals from the auditor's judgment should be encouraged. But the auditor is the last man in the world to refuse to listen to reason and representation, and I am certain he would give every attention and consideration to the properly expressed opinion on the subject of those best qualified to give it. I would therefore suggest that the different legal bodies in Edinburgh should take joint action in the matter, and submit a representation to the auditor stating their views and proposals for the amendment of the system. I am confident that if this were done the auditor would lend a ready ear to any well-considered proposals for alteration; and, even should nothing else result, agents would have the satisfaction of knowing that they had done their utmost in the interests of the public to have an unsatisfactory system altered.—I am, etc.,

AGENT.

THE COMING UNIVERSITIES BILL.

(To the Editor of the Journal of Jurisprudence.)

SIR,—In the more serious part of a review this month of the German university system, you express the conviction that following that system is “the true line for university reform in Scotland.” And you add, that “those would-be reformers who are striving to extend ‘extra-mural’ teaching, and who seem incapable of realizing that there may be *intra-mural rival teaching*, are working for the disintegration of our universities, or their conversion into mere examining bodies. If Mr. A. is recognised by the university court as qualified to lecture on surgery, Mr. B. on natural theology, Mr. C. on modern history, and Mr. D. on private international law, why should they be driven out to an extra-mural school? Why should their classes not be part of the university system?”

Not only is this the true line of reform, but there is no reason why it should not be given effect to in the University Bill about to be re-presented to the Legislature; and there is every reason why the matter should be considered without delay. For that Bill is one affecting the four universities of Scotland, and all their Faculties; and while you might hesitate to abolish at once the extra-mural school of our Edinburgh Medical Faculty, there should be no hesitation in urging what the Bill ought to provide positively for all our other Faculties, and for the other universities. What does it provide for all these? At his last meeting with the Scotch Members, Lord Lothian proposed to restore the words giving the Commissioners power “for increasing the teaching power of any university, *whether by extra-mural teaching or otherwise.*” Why should words be restored which are in themselves ambiguous or objectionable? The sole reason is that some of the professors are supposed still to resist the German system of “*intra-mural rival teaching*,” and that the expressions which elsewhere give power to the courts to introduce that system are so hesitating and ambiguous, that this clause was thought necessary to supplement or balance them. But if we are to have now a new Bill for Parliament to consider, why should we hang back in one clause in order to go too far in another?

The better way would be to add some words to sec. 6, sub-sec. 4, giving explicit power to the university courts "to grant recognition to the teaching of any college or individual teacher, *whether in a subject already represented by a chair in the university or otherwise*, for the purposes of graduation." What you call "rival teaching" would be made possible by words like those in italics (though, of course, it would in practice very rarely happen); and the Secretary of Scotland's clause in sec. 14, sub-sec. 8, "whether by extra-mural teaching or otherwise," might then be replaced by one giving the Commission power to increase the university teaching "under the powers given to the university court in sec. 6, sub-sec. 4, or otherwise."

What is wanted is an explicit instruction to the Commission to introduce the German intra-mural system, to the extent in each Faculty which it shall think expedient. So long as the professors are understood to expect (as Professor Butcher, in a recent lecture, apparently did) that the Commission shall exercise its powers to exclude that system altogether, so long will the Bill be received by university reformers with distrust, and with a tendency to relapse into the abnormal Edinburgh extra-muralism. That Parliament should itself authorize the new system would, I believe, be popular with the country generally, and with all the professions, as it certainly would be with our Faculty.—I am, etc.,

AN ADVOCATE.

19th January 1889.

[We cordially welcome this communication, and we only regret that our correspondent has not seen his way to allow us to add the weight of his name to the indorsement of the views of our last month's reviewer. But whilst our correspondent's opinions seem quite at one with our reviewer's, and our own, we do not think that the words he proposes to incorporate in the Bill would have the effect which he desires and intends. He proposes to empower the university court "to grant recognition to the teaching of any college or individual teacher, *whether in a subject already represented by a chair in the university or otherwise*, for the purposes of graduation." Now had we read these words apart from the

context of our correspondent's letter, we should have construed them as an authority to the university court to do the very thing which our correspondent agrees with us in deprecating, viz. to extend the extra-mural system. "Recognition for the purposes of graduation" is precisely what is accorded to the extra-mural classes. But what we want is something quite different from this, viz. not recognition merely, but *incorporation* into our university system of lectures, and instruction by others than the ordinary professors. For the words of our correspondent which we have quoted, we should be disposed to substitute words somewhat as follows: "to authorize duly qualified individuals to give university lectures and courses of instruction to students of the university, whether in a subject already represented by a chair in the university or otherwise, and to recognise such lectures and instruction as qualifying for graduation." There is a tendency among a certain class of university reformers to reduce the universities to the position of mere examining and licensing boards, the theory being, that if a man has got the information necessary to enable him to "pass," it does not matter *where* he may have got it. This is the system to which extra-muralism naturally leads. But we, on the other hand, are of opinion that *university life* is as important a part of a liberal education as any mere instruction or tuition. At the university the youth of the country, and of other countries, are brought together into great centres of intelligence and enthusiasm. Angularities and provincialisms are rubbed off, prejudices are destroyed or toned down, and ideas of the world, of men, manners, and affairs, are widened and liberalized. It is because we desire to preserve this *life* to the youth of Scotland that we are strenuously opposed to any extension of a system based upon an idea absolutely incompatible with the conception of a university.—Ed. *J. of J.*]

Appointments.

THE business in the Edinburgh Sheriff Court has increased so much of late, that it has become necessary to call in some assistance on the Bench. It has accordingly been arranged that Sheriff Orphoot, who has hitherto conducted the business of the Peebles Sheriff Court only, but whose commission, of course, extends to the Lothians as well, will also sit in the Edinburgh Court hereafter.

MR. ÆNEAS JOHN M'INTYRE, Q.C., has been appointed a County Court Judge. He was called to the Bar at the Middle Temple in 1846, became a Queen's Counsel in 1872, and is a Bencher of his Inn. He represented the city of Worcester in the Liberal interest in the Parliament of 1880-85. In 1875 he was President of the Boston Election Commission.

MR. M. L. HOWMAN has been appointed Procurator-Fiscal for the Orkney Islands, in room of Mr. John Macrae, deceased. Mr. Howman has been Assistant Procurator-Fiscal at Rothesay for some years.

Obituary.

MR. NORVAL CLYNE, ADVOCATE (ABERDEEN).—Mr. Clyne, whose death, at the age of seventy-two, occurred last month, was a native of Ireland. He graduated at Marischal College, Aberdeen, and in 1846 entered the Society of Advocates in the same city. For many years he acted as factor and secretary of that body. Mr. Clyne was a man of literary tastes and pursuits, amongst his published works being *Jacobites and their Poetry*, and *Ballads from Scottish History*.

MR. JAMES R. SHAND, who died on 18th January, was admitted to the Society of Solicitors before the Supreme Courts in 1884. He was a native of Edinburgh, and was educated at Edinburgh University. Mr. Shand was a member of the firm of Messrs. Gordon, Petrie, & Shand, S.S.C.

MR. J. ALSTON DYKES, Procurator-Fiscal at Hamilton, died on 18th January 1889, at the age of 55.

The Month.

A Lucrative Practice.—O'Connell was called to the Irish Bar in 1798. "From the first," says Mr. Gladstone, in the paper which he contributed to the *Nineteenth Century* for January, "he earned something; and in 1813 his receipts already approached £4000 *per annum*. In the last year of his stuff gown, as he told me himself in 1834, he made £7000. In his letter of 1842 to Lord Shrewsbury, he states that in the year before Emancipation, while he belonged to the Outer Bar, his 'professional emoluments exceeded £8000;' and that soon, on his obtaining a silk gown, they must have considerably increased.'"



Production of State Papers.—Civil rights must always be subordinated to State policy, and on this ground State papers have in civil actions been uniformly held privileged from production (*Home v. Bentinck*, 2 Bro. & Bing. 162; *Smith v. East India Co.*, 1 Phillips 50). There are dicta, however, in *Beatson v. Skene* (5 H. & N. 838) and *Kain v. Farrer* (37 L. T. R. 469) which seem to imply that the privilege must be claimed at the trial by a Secretary of State or the Attorney-General on his behalf. *Hennessey v. Wright* (21 Q. B. D. 509) shows that this is not so. It is the bounden duty of the Court itself to interpose, at the trial or on an interlocutory application for discovery, and prevent State secrets being disclosed, whether a Secretary of State appears and objects to production or one of the litigant parties or not. "Salus reipublicæ suprema lex."—*Law Quarterly Review*.



Remainders and Divorce.—"The theoretical difficulty, suggested by the Sadducees of old," wrote the *Law Times* on 19th January, "as to whose wife a woman would be considered in the next world, when she had had seven husbands on earth, somewhat resembles the practical difficulty which has been caused by Lord Justice (then Mr. Justice) Fry's decision in *Bullmore v. Wynter* (48 L. T. Rep. N. S. 309; 22

Chan. Div. 619), as to which wife would be entitled to property settled after a man's death on his wife, when he has been divorced and has married again, and both wives survive him. In that case property was settled on A. for life, with remainder to 'any husband with whom she may intermarry, if he should survive her, for his life.' A. married B., and was divorced from him on his petition. B. married again in A.'s lifetime, and survived her. Mr. Justice Fry held that he was entitled to the life estate, as he fulfilled the conditions of the bequest, being a husband, with whom she had intermarried, who survived her. The learned judge, having referred to the obvious difficulty as to who would take if the wife left several husbands surviving her, from all of whom she had been divorced except the last, refused to give so much weight to the possibility of such a contingency as to overrule what appeared to him to be the plain meaning of the will. Mr. Justice Kay, in the case of *Re Morrieson ; Hitchins v. Morrieson* (40 Chan. Div. 30), felt it to be his duty to regard such a contingency, and to disregard the previous decision on the subject. In the case of *Re Morrieson* personalty was settled on A. for life, with remainder to any wife of his for life. A. married B., from whom he was afterwards divorced on his petition, but he never married again. Mr. Justice Kay refused to hold that the divorced wife was A.'s wife within the meaning of the trust."

Reviews.

Railway Rights and Duties: A Summary of the Law relating to a Railway in Operation. By JAMES FERGUSON, Advocate.
Edinburgh: William Green & Sons, Law Publishers.
1889.

THE publication of this book is opportune, for the Act has just come into operation under which the Railway Commissioners are to sit in Scotland under the presidency of a Scottish judge in Scots Railway Cases. This change is likely to stimulate interest in questions of railway law in Scotland, and it renders it of importance that Scottish practitioners should

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conversant with that branch of law. The book before
 us is a good one, and we only regret that Mr. Ferguson did
 not being a little more ambitious, render it a great deal
 better. Mr. Deas published his work upon railway law in
 1873, and nothing has been written upon the subject in
 England since that publication. Now, we wish that Mr.
 Ferguson, instead of writing the book before us, could have
 brought out a new edition of Deas brought down to
 date. If there is one thing more desirable than another
 in a law book, it is to be able to turn to it, knowing what
 one wants in it, and that one will get what one wants. It
 is important that the whole law, under any particular
 subject, should be collected in one volume, or at all events in
 one work under a single index. (What provocation has not
 been caused by even so small a matter as the two indices in
Barclay's Court of Session Practice!) There is great disad-
 vantage, therefore, in the publication of any fragmentary law
 work. We desire to do no disrespect to Mr. Ferguson's work
 when we ascribe to it this fragmentary character. It is in
 fact a supplement to Deas, covering the period from 1873 to
 1888; it is full of references to Deas, and citations of "cases
per averfionem", and without Deas this volume could in
 no sense pretend to be a complete equipment for a railway
 lawyer. They are fortunate who have Deas, but even they,
 we deem, would much prefer not to be compelled to have
 recourse to two separate works in order to get at the state of
 the law; and as for the large number of young practitioners
 who have not Deas, they are not likely now to be eager to buy
 a work already sixteen years published, although they would
 gladly have welcomed a new edition of that work brought
 down to date.

But laying aside these objections to the general scope of
 Mr. Ferguson's work, we have nothing but praise for the
 manner in which he has carried out his design. As he points
 out, the law which governs the erection of railways had been
 pretty well ascertained when Deas was published, and accord-
 ingly he is here content merely to give a digest of the
 decisions under each branch which have been pronounced
 since. The other great branch of railway law, that which
 runs the company in operation, has been much more

frequently considered by Parliament and the Law Courts within the last few years, and to this branch accordingly the greater part of the work is devoted. The subdivision and grouping of subjects strikes us as being very carefully, and well done, and nothing could be more logical and comprehensive than the principles of order and sequence on which the framework of the volume is constructed. Special attention is given to the provisions of the Railway and Canal Traffic Acts, a branch of the subject of novelty to many, and of new importance to all, Scottish lawyers. In addition to the text and the digest of cases, the volume contains a note of all the statutory provisions relating to the use of the railway, the text of all the recent and of some of the earlier railway statutes, a list of cases cited, and a copious index. We have no doubt that the work will prove of much value both to legal practitioners and also to those more immediately concerned with the management and control of railways. The accuracy of a law book cannot be verified by a reviewer, and can be ascertained only by use; but Mr. Ferguson's reputation for accuracy and industry is a good warrant for the belief that the volume before us will stand the test.

An Essay on Possession in the Common Law. Parts I. and II. by FREDERICK POLLOCK, M.A., LL.D. Edin., of Lincoln's Inn, Barrister-at-Law, Corpus Christi Professor of Jurisprudence in the University of Oxford, Professor of Common Law in the Inns of Court; Part III. by ROBERT SAMUEL WRIGHT, B.C.L., of the Inner Temple, Barrister-at-Law. Oxford: Clarendon Press. 1888.

MR. POLLOCK tells us in the preface how this work came to be written, and sets forth the reason of its form. In the course of his work on the law of Torts, published recently, and noticed in these pages, he had to consider the question whether a doctrine of Possession did not exist in an implicit form in the English authorities, and if so, what kind of doctrine it was. Mr. R. S. Wright had some years earlier been confronted with a like problem when making a survey of the criminal law, and had fully studied the subject from

that point of view. The present work, a systematic exposition of the doctrine of Possession, was then undertaken by the authors. "It is a composite, not a joint work," writes Mr. Pollock. "We should have preferred, for many reasons, to continue our researches in a single and uniform exposition, but we found that such a plan would require an amount, not only of continuous, but of simultaneous leisure beyond what we could command. Accordingly, we have been content to divide the work as it now stands; and although we have discussed many parts of the subject together, and seen one another's contributions in every stage, each of us is alone answerable for that which is ascribed to him on the title-page." The result is, as might have been safely anticipated of any work bearing Mr. Pollock's name, an admirable account of the doctrine of Possession. Previous works have shown how successful an excavator of principles this author is, and his share of this "composite" essay will certainly not lessen that reputation. Mr. Wright's part of the treatise is also very able and extremely interesting.

Part I. is from Mr. Pollock's pen. It is introductory, and deals with First Notions, Terminology, Elements of *de facto* Possession, Possession in Law, etc. Part II., on Possession generally, is also the work of Mr. Pollock. It is divided into three heads: the Nature of Possession, the Transfer of Possession, and Possession and Title. The first of these is a remarkably clear treatment of the subject. In Part III., which occupies half the volume, Mr. Wright deals with Possession and Trespass in relation to the law of Theft. Both authors point out the ambiguity of the term Possession, and classify the different senses in which it is used. Mr. Wright, for example, refers to its three meanings in relation to moveables: (1) mere physical possession ("rather a state of facts than a legal notion"), (2) a legal relation of a person to a thing with respect to other persons, and (3) a right to possession ("either of that general kind, synonymous with ownership, or of a temporary or otherwise special character"). As an example of all these senses: "The owner of a horse hires it out for a month to a customer, who lends it to a friend, who sends out his servant to exercise it his park" (p. 119). It is to the second of these meanings

that the author refers when he points out that the ordinary conception of theft as a violation of a person's *ownership* of a thing is erroneous, and that the proper conception of it is that it is a violation of a person's *possession* of the thing, accompanied, of course, by an intention to misappropriate the thing. "The possession which is violated may be that of a person who has no right of ownership, and no right to the possession." There is a very interesting chapter on "Particular Cases," including Bailment, Loss and Finding, Sale, Taking by Authority of the Law, Fraud and Mistake, Co-ownership, Lien and Stoppage *in transitu*. The whole work does much to define the doctrine of Possession, and cannot fail greatly to simplify its application in actual cases.

The Conditions of Appeal from the Colonies to the Privy Council. With an Introductory Essay. By A. WOOD RENTON, M.A., LL.B., of Gray's Inn and of the Oxford Circuit, Esq., Barrister-at-Law. London: Stevens & Sons.

IN this work the conditions on which our numerous Colonies respectively may appeal to the Privy Council are set forth in tabular form. Such a scheme is clear and most convenient. In four columns are detailed, in regard to each colony—(1) the authority under which appeals are tendered, (2) the appealable (*i.e.* the *minimum* appealable) value, (3) the limit of time within which leave to appeal must be asked, and (4) the security required. In a fifth column are remarks of a miscellaneous kind. There is a decided opening for this handy little work. Mr. Wood Renton prefaces this reference table of conditions with a short introductory treatise, in which he discusses the two questions of the origin of the jurisdiction of the Privy Council in colonial appeals, and how far appeal is a right inherent in every subject of the British Crown. The essay is interesting, though somewhat sketchy. We trust, however, that this useful pamphlet is only the prelude to a larger work by the same author.

The Law Quarterly Review. Vol. V., No. 17, Jan. 1889.—Mr. Pollock's magazine contains much valuable matter this

quarter. It opens with an article on "The County Courts Consolidation Act" of last year, by Judge Chalmers, who considers that the Act owes its existence to Lord Selborne's reform in making the office of Principal Secretary to the Lord Chancellor a permanent one, and thereby securing a continuity in the legal policy of successive Lords Chancellors. There are papers on "How to Simplify our Titles," by Mr. C. E. Thornhill, and "The Reform of Company Law," by Mr. Edward Manson, both of which are full of suggestion. The other articles are "The Liability of Shipowners at Common Law," by Mr. E. L. De Hart; "Feoffment and Livery of Incorporeal Hereditaments," by Mr. Owen Pike; and "Notes on the English Law of Marriage," by Mr. Howard Elphinstone.

English Decisions.

INCOME TAX.—*Exemption — Charitable purpose — Property Tax Act, 1842 (5 and 6 Vict. c. 35).*—Certain property was conveyed to trustees for the purpose—(1) of maintaining the missionary establishments of the Moravian Brotherhood; (2) of educating and supporting the children of ministers and missionaries of the Church; and (3) of maintaining certain establishments appertaining to the Church, for single persons, called choir houses. The choir houses are practically almshouses for aged members of the brotherhood. *Held*, that the income in all three cases was applied in charitable purposes, and was therefore entitled to exemption from income tax under 5 and 6 Vict. c. 35, sched. b. sec. 61.—*Reg. v. Commissioners of Income Tax*, Court of Appeal, 21 Dec. 1888.

MORTGAGOR AND MORTGAGEE.—*Power of sale—Sale to company of which mortgagee a member.*—J. F., one of three mortgagees with a power of sale, and who acted for the mortgagees, sold to a company more or less promoted by himself, in which he had a substantial interest as a shareholder, and whose solicitor he was. There was no fraud or under-value. The mortgagor raised an action to have the sale set aside. *Held*, that the sale, having been made honestly and at a fair value, is valid.—*Farrar v. Farrars (Limited)*, Court of Appeal, 21 Dec. 1888.

PHOTOGRAPH PORTRAIT.—*Right of publication — Property in negative.*—The lady plaintiff was photographed by defendant, and paid him for a certain number of copies of the portrait. Subsequently the defendant, without consent of either the lady or her husband, exhibited in his window a copy of the photograph, in the

form of a Christmas card, with appropriate words printed thereon. The plaintiffs claimed an injunction to restrain the defendant from selling or offering for sale, from exhibiting as an advertisement, or dealing with the photograph either as a Christmas card or otherwise. The defendant contended that the negative was his absolute property, and claimed a right to sell copies of the photograph as he pleased. *Held*, that the plaintiffs were entitled to the injunction claimed.—*Pollard v. The Photographic Co.*, Ch. Div. (North, J.), 20 Dec. 1888.

COMPANY.—*Debenture—Default in payment—Omission to pay—Breach of condition—Appointment of place for payment of interest.*—The plaintiff was the holder of a debenture, dated 5th August 1887, which provided that the company would on 28th November 1890 pay the registered holder of the debenture the sum of £1500, and would meantime pay interest at the rate of 6 per cent., by equal half-yearly payments on 28th November and 28th May in each year. The debenture was issued subject to certain conditions, of which the first was—"If the company makes default for a period of fourteen days in payment of any interest hereby secured, the principal moneys hereby secured shall immediately become payable." The fourth condition provided—"The principal moneys and interest hereby secured will be paid at the Royal Exchange Bank, or at the registered office of the company." By an oversight the secretary of the company omitted to send the plaintiff a cheque for the interest which fell due on 28th November 1888, and no demand for payment was made either at the bank named or at the registered office of the company. At the end of fourteen days from the 28th November, plaintiff raised an action to enforce his security, on the ground that the company had committed a breach of one of the conditions on which the debenture was granted. The company now offered to pay the interest due on 28th November. *Held*, that, as plaintiff had made no demand at either of the places named, there was no default in payment on the part of the company; and that omission to pay and default in payment were not necessarily the same thing.—*Thorn v. The City Rice Mills Co.*, Ch. Div. (North, J.), 12 Jan. 1889.

COMPANY.—*Voluntary winding up—Supervision order—Time of commencement of winding up.*—A petition for the winding up of a company by the Court was presented on 1st December, and a provisional liquidator was, on that date, appointed. On 19th December the company, by extraordinary resolution, resolved to wind up voluntarily. On the petition, a direction was asked that the winding up should be deemed to have commenced at the date of the appointment of the provisional liquidator, and not at the date of the resolution. *Held*, that the winding up commenced at the date of the resolution, and that the Court had no authority to alter the date.—*Re The West Cumberland Iron and Steel Co.*, Ch. Div. (North, J.), 12 Jan. 1889.

Sheriff Court Reports.

SHERIFF COURT OF LANARKSHIRE.

Sheriff BALFOUR.

NEIL M'EWAN v. J. KIRKLAND & CO.

Cessio — Trust deed — Non-acceding creditor. — The following interlocutor has been pronounced by Sheriff Balfour in the case of Neil M'Ewan, joiner, 116 West George Lane, Glasgow, *pursuer*, against J. Kirkland & Co., 20 Renfield Street, Glasgow, and Francis Johnson, 138 Garthland Drive, Dennistoun, Glasgow, the only known partner of the said company, *defenders*.

"*Glasgow, 12th December 1888.*—Having heard parties' procurators on the caveat: For the reasons assigned in the subjoined Note, and being satisfied from the productions that there is *prima facie* evidence of the notour bankruptcy of J. Kirkland & Company, and Francis Johnson, the debtors and defenders: Appoints a copy of said petition and of this deliverance to be served upon the said debtors; and appoints the petitioner to publish a notice in the *Edinburgh Gazette*, at least ten days before the date after-mentioned, intimating that this petition has been presented, and requiring all the creditors of the said debtors to appear in Court, within the chambers of Mr. Sheriff Balfour, County Buildings, Glasgow, upon the 10th day of January 1889, at 10 o'clock A.M.; and within five days next after the date of said notice to send letters to all the creditors specified in the petition containing a copy of said notice, with the name of the petitioner's agent appearing in or annexed thereto (paying the postage thereof): Ordains the said debtor, Francis Johnson, to appear at said diet for public examination, and on or before the sixth lawful day prior thereto to lodge in the hands of the clerk of Court, to be patent to all concerned, a state of their affairs subscribed by them, and all their books, papers, and documents relating to their affairs; and appoints the petitioner on or before the same date to lodge in the hands of the clerk of Court a copy of said *Gazette* and a certificate of the transmission of the letters to the creditors in terms of the statutes.

(Signed) "D. D. BALFOUR.

"*Note.*—The defenders' agent objected to *cessio* being granted, on the ground that in June 1888 the debtors granted a trust deed in favour of John M'Callum for behoof of their creditors, and that the trustee has reduced their estate into possession. It is not alleged that the pursuer has acceded to the trust deed, and I am of opinion that in the absence of such accession a creditor is entitled to take proceedings against the defenders, and to bring a process of *cessio* against them. In other words, a voluntary trust deed does not constitute a bar to proceedings being taken by a creditor who has not acceded to the trust deed. It is stated that there is no estate to administer, and that, therefore, the authorities which have estab-

lished that cessio should not be granted where there are no assets, regulate the present case. This argument is founded on a fallacy. There are assets in the present case, and these assets are in the hands of a voluntary trustee, and the trustee to be appointed under the cessio will have a right to call upon the voluntary trustee to account, and the trustee in the cessio will ingather and distribute the estate among all the creditors. (Intd.) D. D. B."

Act. Muir—Alt. Bannatyne.

SHERIFF COURT OF BANFFSHIRE.

Sheriffs HAMILTON GRIERSON and GUTHRIE SMITH.

BODDIE'S TRUSTEE, *Pursuer* ; FRANCIS NICOL, *Defender*.

Compensation—Partnership—Transaction with partner—Special contract.—A. carried on business in his own name as a general merchant at D., and as a fishcurer at D. and also at E.; at E. he also carried on business as a general merchant in partnership with B., under the name of A. & Co. C., a fisherman, contracted to supply A. with fish at D., and it was arranged that A. should keep C. supplied with necessaries for himself and his family from his shop at D. The fishing at D. failed; and accordingly C. left D. and came to E., where he entered into a similar arrangement with A., the goods being supplied from the shop of A. & Co. At the end of the season both A. and the firm of A. & Co. became bankrupt. The trustee of the bankrupt estate of A. & Co. now sued C. for the price of goods supplied him during the fishing season. Against this C. pleaded compensation, in respect of the debt due to him by A. for fish supplied. *Held*, that, under these circumstances, the rule which excludes compensation of a debt due to a firm by a debt due to an individual partner did not apply; that the case was not properly one of compensation but of special contract; and that the trustee in bankruptcy was not entitled to recover.

This was an action brought by the trustee of the insolvent firm of J. Boddie & Co., merchants, Sandhaven, for the price of goods supplied to the defender, Francis Nicol, fisherman, Gardenstown, amounting to £18, 6s. 11½d. The defence stated was, that the goods had been supplied according to custom, on the order and credit of J. Boddie, fishcurer (the leading member of the firm), on account of the price of herring delivered by the defender. The defender also disputed the existence of the firm. The circumstances of the case sufficiently appear from the Sheriff's Note.

The Sheriff-Substitute (Hamilton Grierson), after proof, found that the firm did exist, and that between the debts due by Boddie and the debts due to Boddie & Co., compensation was not pleadable. He therefore decerned against the defender for £12, 16s. 11d., the amount finally insisted on, with expenses.

The defender appealed. The Sheriff, after hearing parties, recalled the Sheriff-Substitute's interlocutor, and assolized the defender, with expenses. In his Note the Sheriff said :—

“In June 1887 the defender (Nicol) agreed to fish for James Boddie at Balta Sound ; but the fishing there was a failure, and he came to Sandhaven, where Boddie carried on the separate business of a curer in his own name, and the business of a general merchant (in company with a former shopman named Lobban), under the name of Boddie & Co. Boddie and his firm have now failed. The defender has lost the season's fishings, which amounted to £118, 10s., and in addition he is now sued for £18, 6s. 11d., furnishings obtained from the shop when the fishing was in progress. The action was instituted by the trustee, who admitted the hardship of the claim, but maintained that he must do his duty to the creditors. The case presents in strong relief the gravity of the calamity which has overtaken the fishing industry all along that coast ; and as, from the mode of dealing which prevails between fishermen and curers, the same question is raised in many other cases, the importance of this case far exceeds the sum in dispute. The Sheriff holds with his Substitute that the existence of the firm is proved, and that it was formed on the footing, that whilst Lobban would as formerly take charge of the shop, Boddie was to retain in his own hands, for his own behoof, the more valuable fishcuring business. It is not seriously disputed that a debt due to a firm cannot be compensated by a debt receivable from a member of the firm, because the persons represented by the firm and by the individual partners were different interests. Such is the rule of the common law, and the Sheriff-Substitute has given effect to it in deciding against the defender. But it is always open for the creditor, the partner and his co-partner, to contract on a different footing, and the question which has to be determined is, What was the footing on which they contracted ? The Sheriff is of opinion that when, at the beginning of the season, Boddie took Nicol to Lobban in the shop, and told him to supply him with whatever he required, there was not the smallest doubt as to what was intended. It was not meant that the firm should supply Nicol on the personal credit of Boddie, but that Nicol should receive his supplies as against the price of the fish which he had contracted to deliver to Boddie. On no other footing could the contract have been executed, for he was only to be paid at the end of the season, and in the meantime he and his family must live. The legal question which arises on these facts is not, properly speaking, a question of compensation at all ; it was rather a contract to which all three were parties—Lobban, as acting for the firm, Boddie for himself, and Nicol as expectant creditor of the one and possible debtor of the other. The defender suspected no partnership at all. The Sheriff thinks that the slightest evidence that Nicol acquiesced in the proposal, that he should have supplies on the old footing,

namely, as against the fish fished for Boddie, is sufficient to destroy a claim which, in the Sheriff's opinion, would be against the faith of the contract. As that evidence was clear and unambiguous, he has recalled the Sheriff-Substitute's judgment, and assoilzied the defender, with expenses."

Act. Smith—Alt. Allan.

SHERIFF COURT OF ORKNEY.

Sheriff ARMOUR.

MARGARET C. INKSTER, *Pursuer*; SCHOOL BOARD OF ORPHIR, *Defenders*.¹

Educational Endowments (Scotland) Act, 1882—Scheme—Bursary—Discretion of governing body in awarding.—A scheme for the administration of an endowment, framed by the Commissioners, provided, that the bursars should be "children whose parents or guardians are in such circumstances as to require aid for giving them higher education." *Held*, that (1) the Court had jurisdiction to review the decision of the governing body as to a refusal to award a bursary on the ground that the circumstances of the parents were not such as to require it; and (2) that where parents are of such rank in life as makes them suitable recipients of such assistance in the education of their children, the governing body have no discretionary power to withhold a bursary because in their opinion the particular circumstances of the family are not such as to require it.

This was an action brought by Margaret C. Inkster, daughter of William Inkster, Quoyclerks, Orphir, against the Orphir School Board, for payment of one year's instalment of a bursary won by her in May last, and which, it was alleged, had been illegally withheld from pursuer. The nature of the action will appear from the Sheriff-Substitute's note. The Sheriff-Substitute decerned against the defenders, with expenses, and appended the following

"*Note.*—The School Board of the parish of Orphir are the governing body charged with the administration of the funds of what is known as Twatt's Mortification and Tate's Mortification, under a scheme drawn up by the Commissioners appointed under the Educational Endowments (Scotland) Act, 1882. The scheme provides *inter alia* (section 10) for the expenditure of £20 yearly in paying the fees of poor and deserving children, etc. Under section 11, upon which the present dispute turns, the governing body are directed thereafter to apply the remainder of the free annual income of the endowment, 'either or in such proportions as they think fit (1) in establishing school bursaries, each of the yearly value of not less than £3 nor more than £10, which shall be awarded by competitive examination among pupils attending public or State-aided schools in the parish of Orphir, who have passed the fifth standard

¹ We notice this case elsewhere, *vide* p. 90.

of the present Scotch Code, or such standard as may be fixed from time to time by the Scotch Education Department, pursuant to the Education (Scotland) Acts, as that entitling children to total exemption from the obligation to attend school, and whose parents or guardians are in such circumstances as to require aid for giving them higher education; and which shall be tenable for two years at public or State-aided schools, in which efficient instruction is given in the higher branches.' In terms of this section the defenders (the School Board of Orphir), on 24th April 1888, 'agreed to establish two bursaries of the value of £3 each, to date from 1st November 1887, tenable for two years, . . . ' and the examination was fixed for the first Saturday in May following. The pursuer, Margaret C. Inkster, was admittedly first in that examination, and therefore *prima facie* entitled to the first bursary. On 19th May 1888, however, the School Board met, and after the report of Mr. Hossack (the examiner) had been read, finding that the pursuer was first in the competition, the chairman moved that the bursaries be given to those who were second and third respectively, on the ground—as explained by him in the witness-box—that the pursuer's brother already held a similar bursary, and that taking everything into consideration, the pursuer's parents were not 'in such circumstances as to require aid in giving the pursuer higher education.' This motion was carried by a majority of one; hence the present action. It appears to me that the majority of the School Board have taken an erroneous view of their powers and duties under the scheme, and that they have no power to withhold the bursary which the pursuer gained by competitive examination. No doubt, by section 14, the School Board, as governing body, are invested with power to make regulations for the management of the endowment, but such regulations clearly must relate to arranging for examinations and such like subsidiary matters; for the section contains this important limitation, that such regulations must not be inconsistent with the provisions of the scheme. As I read section 2, which is the pregnant portion of the scheme, I am unable to reconcile the mode in which the majority of the governing body regulated the bursary in dispute with the provisions therein contained. The two provisions which it is necessary to attend to in determining this case are—(1) that the bursaries shall be awarded by competitive examination, and (2) that those entitled to compete must be pupils who have passed the fifth standard, and whose parents are in such circumstances as to require aid for giving them higher education. In regard to the first, or the mode prescribed for awarding the bursaries, little need be said. It is the method of selecting beneficiaries expressly directed by section 16 of the Act, which enacts that, 'In framing schedules the Commissioners shall provide that in making a selection from amongst those eligible for the benefits of any educational endowment, due regard shall be paid to merit as ascertained by examination or in such other manner as the Commissioners shall determine.' The dispute really turns on the second of these provisions; that, namely, which

defines the class entitled to benefit by the endowment, and the whole question at issue is simply this, whether the governing body are vested with discretionary powers entitling them to withhold bursaries at their pleasure, according to the view they take of the parents' circumstances. I have gone carefully over the scheme, and have been unable to find anything within it conferring the large powers claimed by the defenders. If section 2 had been framed in these terms, 'and whose parents or guardians, *in the opinion of the governing body*, are in such circumstances as to require aid for giving them higher education,' there might have been a good deal to say for the defenders' view. The section does not contain these words, however, and without some express direction and authority I think it would be contrary to the spirit of the Act of 1882 to convert an educational endowment, awarded according to merit, into a mere charity. The provision about the circumstances of the parents, as I read it, is to be interpreted liberally. It is descriptive of a class—the large and deserving class, namely, who, though they are willing to do their best to give their children a primary education, are unable to afford an education of a higher sort. The governing body no doubt are judges in the first instance as to whether a parent falls within this class, but they are to decide the question as a question of fact, and upon broad and reasonable views; and, above all, they are precluded from adopting a comparative view of the pecuniary circumstances of the parents of the various competitors as a factor in awarding the bursaries. The governing body being bound to treat the question as one of fact and not discretion, there is necessarily an appeal from their decision, and if a parent can show that, looking to his circumstances, he cannot reasonably be expected to give his child a higher education, and if the child has actually won the first place, then it appears to me that that child has an indefeasible right to the bursary. Now I take it there can be little doubt as to the circumstances of the pursuer's father in this case. He is by no means in robust health, with a family of eight, and his small farm or croft is only 16 acres in extent. Surely, he falls within the class defined. But I gathered from the evidence of the chairman, and also from the minutes produced, that it is not seriously contended that the pursuer's father is in such affluent circumstances as to enable him to keep his daughter at school for two years longer, and give her a higher education. The contention on the part of the defenders rather seems to be, that one member of the family having already got a bursary of £3 per annum, and looking to the cheapness of education in the parish of Orphir, this sum would be sufficient to afford education of a higher sort to another member of the same family as well. This view, however, is inconsistent with the provisions of the scheme, as I have already explained, and moreover it appears to me to lose sight of the object for which the bursaries were established, and indeed of the whole spirit of the Act of 1882. The Education Endowments (Scotland) Act, 1882, was passed for the purpose of making the funds left by pious founders for educa-

tional purposes available for higher education in preference to primary—the latter having been efficiently provided for since 1872 in State-aided schools. The preamble sets forth, that ‘it is desirable to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founders’ intentions, and, so far as may be, to make an adequate portion of such endowments available for affording to boys and girls of promise opportunities for obtaining higher education of the kind best suited to aid their advancement in life.’ Accordingly, the present scheme was framed under the Act, with the object, among others, of enabling promising children to continue their education after their attendance is no longer compulsory, and when, owing to the circumstances of their parents, they require to leave school. It is obvious, however, that if the governing body refuse to allow more than one bursary to go to the members of one family, this object is in danger of being defeated; for a father may very well be willing to maintain, clothe, and educate one child on £3 a year, besides foregoing that child’s earnings, but he may very naturally decline to recognise his obligation to do the same by two children, if he gets no additional assistance. If the defenders’ view be correct, then however promising a child, its chance of obtaining higher education, if it had the misfortune to have a clever brother or sister, would depend—(1) on the pleasure and discretion of the School Board, who might or might not award a bursary after it had been duly won, and (2) on the willingness of the father to make one bursary do duty for two. Both in spirit and in letter the Act of 1882 and the present scheme are entirely repugnant to the interposing of any such barriers; and I am therefore bound to hold the defenders’ view erroneous. It was urged on behalf of the defenders that they had actually given a bursary to the pursuer as from 1st November 1888. It does not seem to me, however, that that circumstance has any bearing on this case, for what is sued for is £3, being that portion of the bursary won by the pursuer in May 1888, and due for the year from November 1887 to November 1888. The result of the judgment will be to decern in favour of the pursuer, with expenses.”

Act. Thomson—Alt. Buchanan.

All communications for the Editors to be addressed to the care of the publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

Gaming.—The decision of the Court of Queen's Bench in the case of *Dyson v. Mason*, January 28, 1889, holding that the playing of pool for small stakes in licensed premises is an offence against the Licensing Acts, has taken a good many people by surprise. But in truth the question was not doubtful, the terms of the statute being clear and conclusive in the matter. The wonder is not that the offender should have been convicted when prosecuted, but that he should have been prosecuted at all. It is quite right that the law should empower the authorities to suppress gambling in licensed premises, and in order to avoid evasions it is necessary that the provision should be so general and sweeping as even to include the playing of pool for small stakes. It by no means follows that, when no more than this is done, a prosecution ought to be undertaken. There are many things, such, for example, as lotteries at bazaars, which in strictness are illegal, but the suppression of which by criminal prosecutions would render life quite intolerable. Occasionally, no doubt, it will happen that bigotry, on the one hand, or a stepping over the line, on the other, occasions a prosecution, and people are amazed for the moment to learn that the law is so stringent. But such incidents are soon forgotten, and the peccadillo is repeated as before. Amateurs need have no fear that the playing of pool for sixpences on licensed premises is a thing of the past.

The Casualty of Composition.—A deputation waited upon Mr. Campbell Bannerman at Stirling, the other day, to call his attention to the great hardship of the incidence of this casualty. There can be no doubt that the burden is a most vexatious one, occasions considerable hardship, and creates a great deal of irritation. We would gladly welcome any proposal whereby, with due respect to proprietary rights, this anomalous burden might be done away with, as, for example, by a statute enforcing a compulsory commutation either for a slightly increased feu-duty, or for a duplicand at certain intervals. But what strikes one forcibly in reading the speeches made by such deputations and newspaper correspondence on such matters, is the inveterate conservatism of popular belief. The other day an eminent divine pointed out that the gloomy Calvinism of the pulpit survives only in the imaginations of people who never go to church. So, many of the rigours of the law survive only in the minds of people who know nothing about the law. We do not think we exaggerate, when we affirm that nine-tenths of the people of Scotland believe that a great part of the land in Scotland is tied up from the market by the law of entail. So in regard to such feudal burdens as composition. One gathers from the speeches of the agitators that they are quite ignorant that it is now impossible to create this burden in any feudal contract, and that where it subsists it may be redeemed in perpetuity at any time by paying one and a half its amount a single time.



The Case of Mr. O'Brien.—In the course of a trial of Mr. O'Brien for an offence under the Crimes Act, his counsel applied for a warrant to cite Lord Salisbury and the Chief Secretary for Ireland as witnesses in the cause. For reasons not difficult to appreciate, the magistrates refused the request, and this led to a manifestation of feeling in the gallery. The magistrates, in consequence of this disturbance, ordered the gallery to be cleared, and whilst this was being done, the accused at the bar rose and said he was going too. The magistrates, however, forbade him to leave, but he persisted, and, although seized by a policeman, he managed to escape from the Court-house, leaving a portion of his coat in the

constable's hands. Thereupon the magistrates adjourned the case until the following day, and on that day, no appearance being made for the accused, they passed a sentence of imprisonment against him in his absence. On an appeal to the Supreme Court the decision of the magistrates was confirmed. Such was the course of the proceedings *in foro* in the O'Brien case. There can, we think, be no doubt that, from a purely lawyer's standpoint, and apart from political considerations, Mr. O'Brien was in the wrong. The explanation of his conduct put forward by his counsel, Mr. Healy, a man of great ability, is that he regarded the clearing of the gallery as an invasion of his constitutional right to be tried in open Court. A judge, says Mr. Healy, may undoubtedly order any individual whom he sees creating a disturbance to be removed, but he is not entitled on account of disturbance to sweep the righteous with the guilty out of the Court. Such a contention is absolutely untenable. Order could never be maintained in a Court, if, on the occasion of a disturbance, it were necessary to try each individual present, to ascertain whether he had taken part in it. When anything of the kind occurs here, our judges never hesitate to clear the galleries, and nobody ever dreamt of questioning their right to do so. But be it that the magistrates acted improperly in clearing the Court, it is absolutely contrary to all our conceptions of the authority and dignity of a Court of justice, that parties aggrieved by its action should be allowed to express their dissatisfaction by a protest in the form of a theatrical withdrawal from the Court-room, and to compel the Court to suspend all proceedings until they choose to come back. Finally,—again we speak of the matter purely in its legal aspect,—it is clear that Mr. O'Brien was in the wrong in disobeying the order of the magistrates forbidding him to leave the building, and in forcibly resisting the officers of the law. There can be no doubt, then, that from a legal standpoint Mr. O'Brien was wrong throughout. Whether he broke the law in obedience to a higher law, we leave it to the politicians to determine.



Scottish Local Government Proposals.—For some weeks past magazines and newspapers have contained a plentiful supply of matter on the subject of Local Government Reform in Scotland. The *form* of the suggestions has ranged from mild advice to somewhat threatful admonition, and from more or less faltering hope even to confident forecast; yet the practical proposals all told have not been many, nor have they displayed much variety. The main object in all the schemes is, of course, to consolidate the existing authorities, and to get rid of the multiplicity and overlapping of areas. So much in this way has already been attained in burghs, that the proposals have been practically confined to counties. The suggestions unanimously point to the institution of a Council for each county, to be popularly elected, which shall take the place of the present Commissioners of Supply and the present Road Trustees. The Council's powers vary in the different schemes. Some would give them the whole of the powers at present vested in the Commissioners and the Road Trustees, together with the Licensing and Control of Public Houses, etc., which they would take from the Justices of the Peace, and all matters affecting the Public Health, which they would remove from parochial control. Some would transfer to the Council, also, the work of the present School Boards. All, we think, without exception, are in favour of retaining the parish as the smaller unit of administration, and as the area for the election of members to the Council. The Council would manage Poor Law matters and the Registration of Population (to which some would add Education), by means of parochial committees, consisting, in the case of each parish, of those members of Council elected by the parish. Most suggest, in this connection, the giving of power to combine a number of small parishes for the purpose of administering these matters. Other branches of administration the Council would assign to District Committees, as is done at present in regard to the Roads and Bridges Act, etc. It seems to be understood that the long-vexed question of the Control of the Liquor Traffic will not be touched in the Ministerial measure, owing to the effect which the introduction of so controversial a matter would have on the Parliamentary prospects of the Bill. There is, too, a general impression that

Education also will for the present be left unchanged. Simplification of the arrangements for assessing and collecting local rates is a reform on which all insist. No good ground, indeed, is perceptible why one single assessment should not be levied to cover all local rates. It has been urged by several local officials that there ought to be one tax-office in each county, into which all taxes, local and imperial, should be paid.



A Scottish National Council.—As time has gone on, the competitive designs for Local Government Reform, published in the newspapers, have become more ambitious, until now we have more than one scheme which includes two perfectly distinct things. Starting from a treatment of Local Administration, as that term is generally understood, certain reformers have passed beyond that domain to propose the institution of Provincial Councils and National Councils. The composition of these more central bodies varies a good deal in the different designs. A Convention of Royal Burghs, with a Convention of County Councils added to it; a General Assembly of Representatives from all the subordinate Boards; a Convention of the Scottish Members of Parliament, with Representatives of the County Councils and Town Councils added; and, again, a grouping of several County Councils to form a Provincial Assembly,—are among the proposals put forward. Without in any way pronouncing on the merits of the question, we think it would be a mistake to attempt to introduce both these reforms in one Bill, or at one and the same time. They involve different principles. The reform of Local Government in the strict sense amounts to no more than the simplification and consolidation of present arrangements, and the placing of the local authorities on a popular basis. That we believe the country to be prepared for. The institution of a Central Government in Scotland, to deal with what is described as “domestic” matters affecting Scotland, is breaking new ground. It is not so obvious that the public is yet ready to accept this without an amount of discussion which might imperil the chances of the former and simpler proposal.

Compensation to Publicans.—We noticed a question in the papers the other day as having been put to a Parliamentary candidate, beginning as follows:—"Seeing that the Courts of law have decided that a publican has no right to compensation, etc." The reference was, of course, to the case of *Sharpe v. Wakefield*, 15th Dec. 1888, on which we commented in our last issue. It need hardly be pointed out to legal readers that the case in question decided nothing of the kind, and had no direct bearing upon the question of compensation to publicans. The case established, what had generally been understood to be law in England, and what had never been doubted in Scotland, that magistrates, so long as they act judicially, and apply their judgments to the best of their ability to the merits of each particular case, have an absolute discretion to determine whether or not particular licences shall be renewed or withdrawn. A proprietary right in a licence above or independent of the licensing authority is a thing that has never even been contemplated in Scotland. It is true that licensed premises have values far in excess of their worth without the licence; but these values arise not from any vested right in the licences, but from the probability or the assurance that if the places are well kept, the licences will be renewed year by year. If compensation is to be given to publicans, it must be not for the loss of any proprietary right recognised by the law, but for the loss of a privilege which, though no doubt liable to be withdrawn at any time, has become so sanctioned by consuetude as to possess a market value hardly less than if it had been held by an indefeasible title recognised by the law.

Special Articles.

ESPOUSALS AND BREACH OF PROMISE OF MARRIAGE.

IN the *Cape Law Journal* for December last, there is an article upon this subject of great interest and ability, by Mr.

Van Zyl. We do not recollect ever to have read anything so full of a strange, quaint blending of erudition, fancy, simplicity, and humour. We propose to give an outline of the contents of the article, and we feel sure that our readers will be grateful for the frequent quotations at length of our learned author. Mr. Van Zyl, who is of Cape Dutch blood, begins his article in true Teutonic fashion, with preliminary and indeed somewhat rudimentary definitions.

"An espousal or betrothal is an engagement or a mutual promise, entered into between two persons, male and female, capable of contracting, and who are not within the prohibited degrees, to marry each other at a future period.

"Espousals between persons who stand in the prohibited degrees of marriage are void *ab initio*; and so also is an espousal by one of married persons to an unmarried party who knew of the other's existing marriage, although the engagement was entered into upon the condition of marrying the other upon the death of his or her spouse. But if the party to whom the proposal was made was innocent of the other's marriage, then, although the engagement would be void, the innocent party has an action for damages for breach of promise (Grotius 1. 5. 2, and the references; also Van der Keessel, Thes. 62)."

With characteristic thoroughness, Mr. Van Zyl next proceeds to consider the prohibited degrees and impediments to marriage, but we need not follow him there. The relations of parents to betrothals are then examined.

"Among the ancients, the children would either ask the parents to look out for spouses for them, or the parents would indicate whom the children should marry; thus Abraham sent his servant to fetch a wife for his son Isaac, and he *chose* Rebekah at the well, near the city of Nahor (Gen. xxiv.); Judah *took* a wife for his son Er (Gen. xxxviii. 6); and Isaac said to his son Jacob, 'Go to . . . the house of Bethuel . . . and *take* thee a wife from thence' (Gen. xxviii. 2); Shechem said to his father Hamor, '*give* me this damsel to wife' (Gen. xxxiv. 4); and Samson told his parents to *get* her (a certain woman in Timnath) for me to wife' (Judges xiv. 2); the Priest of Midian *gave* Moses Zipporah his daughter (Ex. ii. 21). Sometimes a king provided a wife

for a favourite or minister; thus Pharaoh *gave* Asenath, the daughter of Poti-pherah, to Joseph (Gen. xli. 45). Hermione declares that it was her father's business to provide a husband for her (Euripides, *Androm.* 951).

"In the later period of the Roman republic it was customary for parents to betroth their young children to suitable partners, sometimes even without their knowledge. But our law requires that the consent of the intending spouses must be mutual and voluntary, and if either has been threatened or unduly influenced thereto, or the engagement is entered into through force or fear, or against the free will of one or the other, it is void (Bronwer, *de J.*, Con. 1. 17. 10)."

The question as to which side the proposal should come from, is next handled with much gravity and earnestness. Mr. Van Zyl's views on this subject are certainly advanced, but we have no doubt that they will receive some support in this country.

"Proposals from the most ancient days, have generally come from the man. 'And the sons of God saw that the daughters of men were fair, and they took them wives of *all of which they chose*' (Gen. vi. 2). I have no knowledge of universal history, so I cannot say whether the woman ever proposed marriage. There is, however, nothing in the law of any part of the civilised world to prevent their doing so. It is an absurd fashion only which fetters them. They have at the present day not even the advantages or opportunities which their two ancestors Eve and Rebekah had. The former *'was taken to Adam'* and the latter was *sent to Isaac* (Gen. ii. 22; xxiv. 59).

"The ladies, as the leaders and moulders of society, and inventors of fashion, should resent and break through this fashion, *and not be so selfish as to retain to themselves the privilege of saying 'No.'* If one of them *takes a fancy* to a man whom she knows to be either too nervous and bashful to propose, or whom she knows from his position, either through poverty or social inferiority or superiority, to shirk proposing, why should she not make her feelings known to him, just as well as the man is allowed, nay even encouraged, by society to make his feelings known to her? Many ladies have braved dangers and risked their lives for the sake of

others, or for the sake of common humanity, on battlefields, and in pestilences and in hospitals. Many have also studied for and mastered all sorts of professions, and spoken from all sorts of platforms, in spite of tremendous opposition from all sorts of people, males and females, and from the most learned man to the biggest dunce. Many of them have also undertaken, sometimes even by marriage, to reclaim a rake or a drunkard, or to mould a vagabond into something good; yet amidst all these trials and oppositions they have retained their good name and virtue without even a shadow of suspicion. Why then should they remain the slaves of fashion, when they have proved that they can do what man has done, especially when the question is purely a social one, in which they have as much, if not even a greater, interest than men? Many a man who has had a contempt for the female race has through the influence of the ladies been brought to warmer and juster sentiments towards the opposite sex, and has never thought of reproaching them for anything they have done under those circumstances, or for perhaps accompanying and attending to the sick and wounded in the Red Cross Hospital Ambulances in times of war. It only requires half-a-dozen leading ladies of society to set the example by proposing marriage, and fearlessly proclaiming it to the world; others will soon follow suit."

Mr. Van Zyl next passes on to consider the subject of delay in fulfilment, and points out that whilst any reasonable delay will not either ground an action for breach or entitle the other party to resile, still all delay must be within limits, and undue delay will amount to a breach of the contract, entitling the other party either to resile or to sue for damages.

The manner or form of words in which the engagement is entered into is the next subject handled by our author.

"An espousal does not require any particular form of words or solemnity to make it binding, and it may be entered into either verbally or in writing or in any other way; the *essential requirement of the law is the mutual agreement of the parties*, and this may be expressed either personally or by letters or by conduct, or by means of others—for instance, by procuration or by a third party especially authorized thereto, which is frequently done among illustrious persons. Thus

Abraham sent his servant to ask a wife for his son Isaac, and he chose Rebekah (Gen. xxiv. 4, 47, 51-67)."

Certain actings, it is pointed out, do not infer a promise of marriage; and in regard to some of these, the astonishing thing is not that they do not infer such a promise, but that anybody could have been supposed to imagine that they did. Thus, for example:—

"*Sleeping together is no proof of promise of marriage* (Hol. Cons. vol. iii. Cons. 90, n. 14).

"Nor any presents given by the one to the other (Hol. Cons. vol. iv. Cons. 105, and vol. v. Cons. 218), or *kissing each other is no proof of promise of marriage* (Loenius, Cas. 14).

"An illegal, an immoral, or an impossible condition is not binding; nor is an indecent, or disgraceful, or scandalous condition (Hol. Cons. vol. v. Cons. 106; Van der Keesel, Thes. 47 and 48)."

The effect of ambiguous or indirect forms of proposal or promise is next considered.

"A man asked a woman to be his wife. She answered, 'Ask my father—his answer shall be my answer.' He asked the father, who said 'Yes.' She thought he would say 'No.' This was not binding on her, on the ground that there was not a mutual agreement, as she thought that the father would say 'No.' More especially if she could give satisfactory reasons why she thought he would say 'No.' But if she had simply left the decision entirely and unreservedly in the hands of her father, to be guided by his answer, and by some word, act, or deed had afterwards ratified his answer, that would be binding on her.

"'When shall you and I stand like that?' said a man to a woman, pointing to a bride and bridegroom before the altar. She answered, 'Whenever you like.' In themselves this question and answer are not binding on either party, but coupled with the conduct of the parties, either before or subsequently, they may be held binding. I know of several marriages where people traced their betrothals to similar questions and answers, which, though at first were out of idle gossip or fun, were afterwards regarded by the parties as serious.

"So, also, speaking of a marriage, 'When shall we follow

suit?' or 'When shall you and I do likewise?' or 'Would you like to be nearer related to my family?' or 'Will you come and share my house with me?' are abstractedly not proposals of marriage, but coupled with conduct or the nature of correspondence, before or since, may be regarded in that light.

"Many young people between whom there was an 'understanding,' or who were on a fair way to betrothal, would have become engaged, but for *the undue haste of relatives or friends to chaff or tease them about it*. The result has often been that by way of denial or exculpation one party has unnecessarily and unintentionally made disparaging remarks of the other, as a reason of excuse why he or she would never think of marrying the other. These, in turn, again have led to coolness in some families, and even to actions of slander. But apart from the iniquitous habit of this *premature teasing*, young men have suddenly ceased to meet the lady anywhere, or to visit at her parents' house as before, not even by invitation, and thus have caused unnecessary surprise and pain to the parents as well as to the young lady."

Contrary to the general principles of jurisprudence, and by a singular perversion of the rule that drunkenness is no excuse, it appears that by Dutch and Cape law, a binding promise of marriage may be given by a drunk person.

"A promise made by the one party to the other, while drunk, is binding, as drunkenness is no excuse, unless the party succeeds in proving that his or her drunkenness at the time of the proposal amounted to insanity or incomplete loss of reason (Loenius, Cas. 46; Bronwer, de J., Con. 1. 4. 11. and 12)."

Mr. Van Zyl suggests a form in which a prudent lady will deal with the proposals of a law student.

"A promise of marriage may be made conditionally, and is binding provided it is reasonable; for instance, 'I accept your proposals on condition that you pass a creditable law examination at the next University Examinations' (Van Leeuwen, Cens. For. by Schreiner, 1. 1. 4).

"A young attorney, who was in the habit of concluding or winding up his love letters to his lady-love with the hackneyed old legal phrase, 'Yours, without prejudice,' was

sued by the lady for breach of promise of marriage, and defended the action on the ground of the precautionary words here used, which he said protected him from any action of the kind. But the Court (this happened in England in 1886) very properly told him that he had wholly misapplied and misunderstood the meaning of the words, and condemned him in damages."

The relation of presents to betrothal is examined with much erudition, and it is pointed out that these, though valuable adminicles, are not indispensable.

"From the most ancient period it was customary for the engaged parties to make presents to each other; sometimes their relatives also made them presents. Thus Abraham's servant gave 'jewels of silver and jewels of gold and raiment' to Rebekah (Gen. xxiv. 22, 30, 47, 53); and so also Shechem offered, if he might but have Dinah for his wife, any dowry that should be demanded for her, and any gift to her relatives (Gen. xxxiv. 12).

"In certain cases, when the intended husband was unable to give the customary presents, service of some kind was substituted. Thus Jacob served fourteen years for Rachel (Gen. xxix. 18-20, 27, 30); or some other act was demanded by the father of the girl (1 Sam. xviii. 25-27).

"Occasionally a father endowed his daughter; thus Caleb gave Achsah certain springs (Josh. xv. 16-19; Judges i. 12-15); and Pharaoh gave the city Gezer to his daughter, Solomon's wife (1 Kings ix. 16).

"In the Roman period, an *arraha*, or earnest (Dutch, *Godspenningen*), was given by one party to the other, by way of pledge of good faith to abide by the engagement. At the present day rings are exchanged. But it never was, nor is it now, the law that any pledge or present or dowry should, as a matter of course, be given on an engagement. It was, and is, customary and complimentary but not obligatory, and I know of many instances where it was part of the engagement by one or other of the parties not to give or to accept any engagement or wedding ring to or from the other."

The question of proof of engagement is then handled at length. It is pointed out that an engagement may be proved by unequivocal writings or by evidence of unequivocal

promise. But some cases are more difficult. There may be no letter which of itself amounts to a promise of marriage, and yet the whole correspondence may be sufficient to infer such a promise. Again, the whole correspondence may be insufficient, "but coupled with conversations of the parties, or what one or other of them said to some one else, and their general conduct, all compared and taken together, go to prove an engagement." The proof or verbal promise is next considered, and here the learned author waltzes so wildly into the most delicious romance that we cannot forbear quoting him at length. Here, as elsewhere throughout, the italics are ours.

"It is a rule of law that a *betrothal may be made in any way*, and though frequently there is a question and an answer, these are not absolutely necessary. 'The subject of marriage is broached (says Van Leeuwen, Cens. For. translated by Schreiner, bk. 1. chap. 2. § 8), and *virgins promise themselves away, for the most part in some retired nook, far from spectators.*'

"Where there is a question and an answer, the Court must judge of them; but there are many engagements where there has been a question or a proposal of marriage, but no direct answer given of either *yes* or *no*; from this arises the common expression, *especially at tea tables*, that 'silence gives consent.' Nothing can be more erroneous. *A woman may be thunder-struck at the audacity of a man to dare to propose to her, and she may simply look at him*, either in bewilderment or surprise, and not say a word. To construe this silence into consent is absurd. Or she may give him *such a stare or withering look*, without saying a word, as to be *tantamount to the most emphatic 'no' that can ever be uttered.* Or take another instance, she may simply ignore his question, whether from callousness indifference, inexperience, youth, shame, bashfulness, or for quiet or peace' sake, not wishing to commit herself, or whatever reason or cause she may have. Such silence cannot be construed into consent. But when her silence is coupled with an *overt act*, that is, by open assertions, acts, or conduct generally, going to show that she favourably entertains the man's attention to her, then such conduct must be construed in favour of the man's intentions, and into an acceptance of his proposal. To illustrate this principle I give you two examples,

for and against; excuse their length, but to give a practical instance I cannot curtail them, and first as to the latter:—

“A lady whose father was in gaol for debt, endeavoured by every means to liberate him, but failed. A young man who had previously unsuccessfully wooed her, thought now was his chance, and he called upon her. He said he had heard of her father’s misfortune, and came to sympathize with her. Anyhow, after a long conversation, during which she repeatedly cried, she appealed to him for assistance. He answered, ‘Yes, if you will consent to be my wife?’ *She blushed, dropped her head, but gave no response.* He then took her hand and repeated his question, at the same time putting his arm round her neck, to which she made a show of resistance, and he gave her a kiss, which she also *feignedly tried to resist*, but she did not speak. After a pause, she asked him, ‘Will you really pay my father’s debt?’ He answered, ‘Yes, upon my word of honour, and to-morrow morning at nine o’clock he shall be a free man.’ ‘Oh, how good of you!’ she exclaimed; ‘thank you so very much, we shall all be very grateful to you;’ and *then kissed him*, and at the same time releasing herself from his hold, left, saying, ‘Let me go now and tell the family,’ which he took to mean, to tell them of their engagement. The next morning the debt was paid by him, and the father was released from imprisonment. The young man repeated his visits every day for several days, but never saw the young lady alone, though she was more friendly to him than formerly; but, as it subsequently proved, she always avoided seeing him alone. He then told her father of his engagement to her, and, on her denying it, he narrated the occurrences here mentioned. She, in her defence or excuse, admitted what passed between them, but explained and proved that before the occurrence of these facts he had paid her marked attentions which she never returned; explained that she was in great distress at her father’s incarceration, and felt that when the man made the offer to pay the debt and attempted to kiss her, that, *if she wholly resisted the kiss*, he might withdraw that offer; *for the same reason she did not forcibly resist his putting his arm round her neck*, and that on being for the second time assured that he would pay the debt, *she, out of gratitude, thanked and kissed him*; that when she

said she would 'tell the family,' she meant what in fact she did, to tell them of the prospect of her father's release the next morning, and by whom, but she never mentioned a word to a soul about the proposal, nor would she ever have said a word about it, till he broached the subject to her father; that her whole conduct, before as well as since the proposal, was one of avoidance, and that the family knew she did not care to meet him alone; and that the only occasion of their meeting alone was the one here mentioned, and which was in her father's interest.

"Surely no engagement can be inferred from this? and such conduct of a young lady so situated is perfectly consistent with the facts of her denial of an engagement, and excusable under the circumstances, as only those who have been in great distress, want, trouble, and trial, can, with a perfectly clear conscience and with a due regard of the utmost sense of propriety, testify.

"Now, as to the former example:—

"On a lady admitting the proposal, but denying the promise, of marriage, the young man, who was very nervous and bashful, sought advice. He could produce no letters and had no witnesses, and was asked by his legal adviser to give a true and full statement, such as he could swear to in Court, of all the facts upon which he founded the lady's promise of marriage, and did so as follows, *in a stuttering, blushing, and serio-comic way*:—'Miss —— and I, after promenading about the garden, as we frequently did, resolved to return to the reading room to see the morning paper. I had been *endeavouring all the morning to propose to her*, but could not summon courage. *On the pretence of reading the latest European telegrams together, I somewhat abruptly said, 'Will you be my wife?'* She dropped the paper, looked down, blushed, turned round, and moved slowly off as if to leave the room. I said, 'Miss ——, don't go away; *you might at least say good-bye before you go;*' and at the same time I advanced up to her, gently and tremblingly took hold of her right hand. She did not withdraw it; I felt her hand trembling in mine; my knees began to tremble also, and knocked together; *I felt as if I was going to sink in my boots;* at the same time I felt also a choking sensation in my throat, and *for a few seconds there we both stood,*

as if dumb-struck and pinned to the ground. But beginning to dread that some one might come into the room to put it in order before the usual time, I gently tried to face her; her head was lowered, and her face covered with blushes. I had still hold of her hand, and where I mustered courage from I don't know, but *I felt I grew a little familiar*, and for the first time called her by her name, and *stuttered, 'O Lily,' and then I felt as if I was choking.* I coughed, I verily believed from the choky sensation, upon which she turned round, looked me in the face, and I gazed nervously and tenderly into her eyes; she blushed all the more, and then gently dropped her head on my shoulder, and closed her eyes. *I put my one arm, for the first time in my life, round her waist*, while still holding her one hand in mine; she made no resistance, and then I stole or imprinted a kiss, *also my first kiss*, gently on her forehead; again she made no resistance. I then drew her nearer to me, and *held her somewhat more tightly round the waist, just as one would do when about going in for a wild waltz.* Again, no resistance. She then opened her eyes, looked up to my face, put her free arm timidly round my neck, blushed more than ever, and *whispered 'Jack,' the first time she called me by that name.* I then kissed her two or three times on her lips, and received a kiss in return, and then *we stood for a few seconds hugging and kissing each other till her breakfast bell rang, and then—I felt that she meant Yes.*

“Now suppose this occurrence was afterwards denied by Lily as an acceptance of the proposal, it would be for Jack to prove it at the trial, coupled with the further proof that his visits and attentions had always been favourably received by the lady, and of their frequent meetings and walks together alone; and it would be for Lily to explain her conduct, why she went beyond the usual bounds of modesty and propriety allowed by society to only those who are accepting proposals of marriage, or who are engaged to be married; and if she failed to satisfy the Court, she would be held by her behaviour to have accepted the proposal.”

Nothing could well be more *fetching* than to find a learned Anglo-Dutch jurist, who quotes Genesis and all the Pundits, revelling in such delightful day dreams. The difficult question of “understandings” is next treated with much discrimination.

"But the most difficult kind of engagement to prove is that in which there was no proposal made or question asked, and of course no answer given, but somehow or other the parties find themselves engaged to be married, or in that position of mutual confidence tantamount to an engagement, from which neither of them can morally and honourably withdraw, and they do not know from when it dates. This kind of engagement is *what some young ladies call an 'understanding ;'* and it is *this 'understanding,' which the parties themselves often do not understand,* that the Court is asked to interpret.

"To arrive at this 'understanding' between the parties, it has often to be traced far back, and a great variety of little incidents have to be put together, and the conditions and circumstances of life, and ways and habits and education or ignorance of the parties, have also to be considered. Many of these 'understandings' have their origin in various causes, but *most frequently,* though it may seem incredible, *arise from condolence at interviews at the loss of a valued friend or relative,* in speaking of his or her good and many virtues, and each bringing to the notice of the other some favoured expression or good quality of the departed ; or *consolations offered at the disappointment of a broken-off match, especially when it is at the same time announced that the man is engaged to be married to another, and then join in running him down and calling him by all the ugly names mentioned in the Dictionary ;* or from sympathy at the disappointments, losses, misfortunes, troubles, trials, or illness of another ; or even from regret or sorrow at the persecution one receives at the hands of another ; or sometimes for a very ridiculous reason : thus it was said of Hall, the preacher, that he *offered his hand to his maid-servant* the first time he saw her, *because she put coals on the fire precisely as he would have done himself !* And there is a story of another gentleman, that he *chose a lady for his wife because he liked her way of eating cheese !*

"But whatever its cause or origin, the Court has to ascertain whether from all the circumstances concerning the parties as disclosed at the trial, when fitly pieced together, an engagement to marry each other must be presumed.

"In the inquiry on this point, every incident going to prove this agreement must be taken into consideration. Little

isolated acts, hints, looks, signs, or gestures, or expressions dropped now and then by either party, and all the other *little mysticisms which lovers know how to indulge in*, when dis-associated from the idea of an engagement, may be perfectly natural and innocent in the eyes of the beholders, but when put together and taken as one united whole, may go far to strengthen, if not prove, the plaintiff's case. All the circumstances of the alleged engagement, and the conduct of the parties, their acts and behaviour towards each other in public, and everything written or said by either of them to each other, or to anybody else, about the engagement, must be taken into consideration (Hol. Cons. vol. v. Cons. 84). The general behaviour may be such as to justify the remark of a certain *busy-body, meddling, disappointed old maiden aunt*, whenever she thinks from the conduct of the parties that they must be engaged, and when it is denied, 'If you hain't engaged, you haught to be,' meaning thereby that if a man's intentions be honourable to a virtuous woman, he should not pay her unusual and conspicuous attentions, to the neglect, or regardless of the presence, of other ladies; if so, the conclusion is that he is wooing her; and if she reciprocates such attentions, the inference is that there is an 'understanding,' or an implied engagement, which they may as well formally announce to the public."

The various *indiciæ* of an engagement, or "understanding," are now enumerated with much gravity by our author.

"Frequent visits to the house of the lady, and seeing her alone, and being otherwise frequently seen in her company; going out with her for walks or drives or rides; withdrawing themselves at parties or dinners or games to secluded or isolated spots; or their behaviour in a ball room, by *noticing each other as if they were each other's exclusive property*, or coming to enjoy themselves only, and not considering others; or presents given to each other, *kissing and winks or signs* which they do not wish others to know of; carrying out each other's wishes or desires as to accepting or declining invitations or as to dress; or the gentleman less frequently visiting other families than formerly, and being in consequence seen more at the lady's house than usual, and also *frequenting his 'ub less during his spare hours*; also, by *more frequently going*

with the lady to her church, and less to his own; and otherwise by constantly paying her unusual and marked attentions wherever she may be, and which, if she does not openly reciprocate, she certainly does not avoid. All these little acts, incidents, and occurrences, when put together, go far to prove the intention or leaning of the parties; and if either of them asserts an engagement, and proves the greater part of such events, it will be for the defendant to disprove them. It is, however, easy to deny an engagement, but the bare denial, even on oath, will then not count for much. Satisfactory proof must be given why these liberties or attentions were indulged in or tolerated; and why the exclusiveness or isolation at public places; and *why the kisses* and the presents and all the other little occurrences here mentioned. Of course such conduct may be capable of explanation, but the explanation must be satisfactory, and such as any reasonable man or the Court can accept as being consistent with the probabilities thereof. The best guides in such a matter, for a Court or a jury, are common-sense and a knowledge of human nature."

Mr. Van Zyl next proceeds to enumerate the grounds upon which an engagement may legitimately be broken off, and he finds one for every letter in the alphabet except z. Some of the grounds he enumerates would certainly not be held sufficient in this country—as, for example, a relative being punished criminally, or a mother having an illegitimate child. But the Dutch law is at one with our own, as ascertained in the case of *Fletcher v. Grant*, 1878, 6 R. 60, in holding that the man is justified in breaking off an engagement on discovering that the woman had once an illegitimate child. It was in this case that Lord Ormidale said that the man "was entitled to insist that the woman should be a virgin."

"An espousal may be dissolved by mutual consent; but besides this, either party may dissolve it, even against the wish of the other, upon just grounds, of which the following are the chief causes (Loenius, Cas. 43):—(a) In a conditional engagement, if the condition has not been fulfilled by the time or on the event agreed upon. (b) For criminal conduct of either party, before or after the engagement; for instance, if after the engagement either party discovers that the other

is leading or has formerly led an unchaste life, but if they were aware of it at the time of the engagement, then he or she would be liable to an action on refusal to complete the marriage (Hol. Cons. vol. iii. Cons. 90, n. 15; Van Alphen's Pap. vol. i. p. 4). (c) If either party leads or has led a dishonest life, or the man finds out that the woman whom he thought to be innocent was not a virgin; for in a promise to marry chastity and modesty are tacit conditions (Hol. Cons. vol. iv. Cons. 283, and vol. vi. 2nd pt. n. 107; and Schreiner's Van Leeuwen, 1. 1. 28 and 29). (d) Adultery committed by either party. (e) If either party has been convicted of a crime, and the other did not know of it at the time of the engagement. (f) If after the engagement either party leads a drunken, dissipated, or profligate career (Loenius, Cas. 14). (g) If during the engagement an unfortunate event occurred in the family of either; for instance, if any one is punished criminally, or the mother of either is confined of an illegitimate child. (h) Theft committed by either party (Loenius, Cas. 14). (i) If either is deeply involved in debt (Van Leeuwen, Rom. Hol. Recht. bk. iv. tit. 25, § 5; Utrecht, Con. vol. ii. Cons. 104). (j) If either party becomes bankrupt or insolvent (Loenius, Cas. 14). (k) If any fraud has been practised by either party upon the other, as an inducement to the marriage, either as to the property or as to the social position of the parties; for instance, if false representations are made as to the wealth and amount of fortune, etc., and if either gives him or herself out to have a certain trade or profession or calling, and it is afterwards discovered not to be so (Hol. Cons. vol. ii. Cons. 104, n. 2 and 3; Utrecht, Con. vol. ii. Cons. 104; and Schreiner's Van Leeuwen, Cons. For. 1. 1, §§ 28 and 31). (l) If after the engagement either party secretly parts with his or her property or wealth, because this may be said to have been an inducement towards the engagement. (m) If either party behaves brutally or uses great violence towards the other, after the engagement, for it may be conjectured that this will be repeated after marriage. (n) Impotency or incapability of either party to procreate. (o) If during the engagement either party becomes blind or deaf, perpetually maimed or disfigured. (p) If either becomes deformed; for instance, by the loss of nose or lips

(Van Leeuwen, Rom. Hol. Recht. p. 432, § 7; Huber, Hed. Regts. vol. i. p. 42, n. 12; and Van Leeuwen, Cens. For. 1. 1. 30). (q) If either party engaged to bring a certain sum of money into the marriage, but failed to do so. (r) If either party has changed his or her religion since the engagement, or if from circumstances either believed the other to be of a certain religion, but subsequently finds out it is not so. (s) If either party becomes a monk, a nun, or a member of the cloisters. (t) By becoming a spendthrift. (u) Insanity of either party. (v) If the parents of either party promise to settle a dowry and fail to do so (Van der Keesel, Thes. 60). (w) Perpetual or incurable bodily disease of either party (Huber, Hed. Regts. bk. i. chap. vi. § 12). (x) By prescription; for instance, if either party without good grounds as to justifiable delay hereinbefore mentioned, remains quiet or in default to carry out his or her promise during two years, and when called upon to fulfil the same, fails to do so without sufficient cause (Van Leeuwen's Rom. Hol. Recht. bk. iv. tit. 25. § 8; and Dig. 23. 1. 17; chap. v. 1. 2). (y) Long and unknown absence for three years (Cod. 5. 17. 2). If a woman has been forcibly seduced against her will, it is no cause for breaking off the engagement."

It appears that by the law of Holland and by the Dutch law at the Cape, specific performance of a promise of marriage could be enforced by the Courts of law, under the penalty of perpetual imprisonment. It is not to be wondered that the British settlers at the Cape rebelled against a law so intolerable, and so contrary to every principle of public policy. Accordingly, as appears from Mr. Van Zyl's narrative, the Home Government intervened, and abolished the obnoxious law, leaving it to the aggrieved to seek redress in an action of damages.

"If, then, either party breaks off the engagement without any lawful cause, he or she may, by the law of Holland, and so formerly also with us, be either compelled to marry the other, or to pay damages for breach of promise. The choice of either action was at the option of the innocent party, and if he or she chose to sue for a fulfilment of the marriage, and the order was given, as indeed the Court could not withhold it, and the defendant declined to marry after this order, he

or she could be civilly imprisoned till the order was complied with (Placaat of 18th March 1656, art. 22). There are several cases decided in this Colony where the reluctant party has been ordered to marry the other *in foro ecclesiæ*, within a time fixed by the Court (*Jooste v. Grobbelaar* ; *Richter v. Wagenaar*, 1 Menz. pp. 149 and 262). But though the Court could order the marriage, they could not compel the parties afterwards to live together as husband and wife ; and accordingly, one young man who was imprisoned for failing to marry the girl he had promised to, finding that he could be detained in prison all his life unless he complied with the order, offered to marry the girl forthwith in the Lutheran Church in Strand Street, Cape Town, of which Church both were members. The girl was apprised of this and consented, and forthwith both went to the church, he *in charge of a policeman, who had to see that the order was carried out, and with instructions, that if he did not marry, to take him back to gaol*. The parties were duly married and the register signed, when he took his hat and hurriedly walked out at the vestry door, leaving the girl, in surprise and embarrassment, to go out at the main door, without explaining his conduct. He had complied with the Court's order, and could not be re-arrested.

"Owing to a large number of emigrants from England, and their children born here, being compelled to marry colonial born women or men, or *vice versâ*, to whom they became engaged to be married, a representation was made to the Home Government, by some of the more influential emigrants, of the hardship and iniquity of a law which compelled a marriage, not only between the emigrants and colonists, but among the colonists themselves, where either of the betrothed parties has ceased to desire to marry the other ; and particularly was the feeling very high on both sides—the emigrants and the colonists—at the time when certain prejudices were still very great. Accordingly, by an order in Council, the Home Government passed a law of the 7th September 1838, now called the Marriage Ordinance, by the 19th section of which the action for compelling the marriage was abolished. By the 20th section a remedy is given to the aggrieved party to institute an action for breach of promise of marriage. But

this was unnecessary, as he or she could do so under the common law."

Mr. Van Zyl concludes his long and delightful article by the quotation of an eloquent passage from one of Erskine's speeches in a breach of promise case. We part from our author with regret. He has illustrated his theme with the light of imagination, and has made the *Cape Law Journal* to follow in the wake of the *Journal of Jurisprudence*, in strewing the page of legal lore with the fair flowers of fancy.

*THE DECISIONS ON THE CONVEYANCING
(SCOTLAND) ACT, 1874.*

II.

In a former paper¹ we exhausted the decisions following on this Act, so far as these decisions have the effect of confining the right of superiors, in questions with their vassals in the matter of casualties, within the limits as by law assigned to them before the Act came into operation. We may define the general results—in which definition we use the words "entered vassal" as meaning a vassal who has either been entered with his superior by writ or precept, or has been entered by force of the statute, and paid the fine or casualty exigible in the circumstances—as follows, viz.—(1) Repeated transmissions of a feu, with infeftments thereon, and consequent statutory entries with the superior, do not, apart from the conditions of the feu contract, and even where a clause prohibiting subinfeudation and dispositions with a base holding exists, entitle a superior to claim more than one casualty, and then only on the death of the last-entered vassal, and from the vassal who at the time stands infeft in the subjects; (2) an unfeudalized title granted by, or flowing from, an entered vassal, is no obstacle to the subsequent entry with the superior of such vassal's heir-at-law; (3) an heir *alioqui successurus*, taking under a singular title, on which infeftment has passed, from an entered vassal, is, notwithstanding such infeftment, only liable in relief duty, in respect

¹ In that paper, at p. 72, in the second line, for "on" read "as;" and in p. 79 read the fourth and fifth lines between the second and third.

of the entry which his infestment implies; and (4) when a radical right exists in the person of a vassal, entered or entitled to be entered, or in the person of his heir-at-law, such a right is sufficient to exclude a claim for a casualty at the instance of the superior against trustees or other disponees to whom the vassal may have conveyed the lands.

We now proceed to examine the cases in which it has been decided that, by its operation, the Act has had the effect of extending the rights of the superior. That extension of the rights of the superior has, as we shall see, taken place in consequence of the vassal being, by force of the statute, deprived of the power, of which he was formerly possessed, of defeating the superior's right to a casualty by a recourse to a peculiar and ancient method of conveyancing.

The cases under this head are four in number. The first in point of date is *Ferrier's Trustees v. Bayley*, 26th May 1877; and we take it separately, not only because it first affirmed the principle on which the other cases of the same class were decided, but because it calls for special attention on account of its similarity, so far as the facts are concerned, to the case of *Mackintosh v. Mackintosh* (decided after it, and noted in our former paper), from which, however, it differs in result. The facts of *Ferrier's* case, to which the law was applied, were as follows: Mr. George Bayley acquired the lands of Manuel under a disposition executed by his father's trustees in his favour, on which disposition Mr. Bayley took infestment, but his infestment remained unconfirmed by the superior until the passing of the Act, when an entry impliedly took place. The last-entered vassal was then, however, still alive, but on his death, in 1876, the superior demanded payment from Mr. George Bayley, as a singular successor, of a year's rent in name of casualty. Mr. Bayley was the heir of that vassal, and with the view of escaping payment of the casualty, and of being entered on payment of relief duty, he tendered himself for entry in his character as heir of the last investiture. The Court (Second Division, diss. Lord Gifford) held that Mr. Bayley's infestment on his singular title, and the entry which was implied in it, rendered his entry as heir impossible, and they discerned against him for a casualty as singular successor. The result in the case of

Mackintosh is so different in effect from the decision in *Ferrier's Trustees* case, that the judgments seem at first sight to be in direct conflict one with the other. This is not so; and an examination of the law as it existed prior to the passing of the Act, and of the decision in *Ferrier's* case itself, will show that the two cases ran on entirely diverse lines, which led to different, but not to contradictory, conclusions.

To ascertain the real import of *Ferrier's Trustees'* case, we will require to revert, for a moment, to the law as it stood prior to the date when this Act came into operation. Under that law a vassal who granted a disposition of lands containing an *a se vel de se* holding was left—so long as the disposition granted by him remained unconfirmed by his superior—with a defeasible mid-superiority vested in his person. On his death that mid-superiority passed into his *hæreditas*, and was capable of being taken up by his heir-at-law. If the heir-at-law took up the mid-superiority, he came into his ancestor's place; thus perpetuating an elusory right of superiority between the real superior and the vassal, which could only be defeated by the confirmation of the title of the latter. The heir-at-law of the mid-superior was entitled to be entered with his own superior on payment of relief duty; and it is scarcely necessary to point out that, if his author's heir was willing to take up the mid-superiority, the vassal had it in his power, by interposing that heir, to defeat the immediate superior's right to a casualty; while, on the other hand, the vassal could at any time thereafter, when he found it necessary or convenient to do so, evacuate the elusory mid-superiority by presenting his own title for confirmation.

In *Ferrier's* case, Mr. Bayley, as heir-at-law of the last-entered vassal, sought to present himself to the superior in that character, for the purpose of taking up the mid-superiority which at one time undoubtedly had remained in his ancestor's person, and so to save the payment of the casualty which would have attached to a confirmation of his singular title. The question before the Court came therefore to be, Whether the estate of mid-superiority contended for by Mr. Bayley existed; or whether, as was argued for the superior, it had been evacuated by the infestment taken on Mr. Bayley's disposition, and the implied confirmation of it

operated by the Act? The Court (Second Division), affirming Lord Curriehill's judgment (but diss. Lord Gifford), decided, as we have already said, after lengthened arguments, against Mr. Bayley; and that on the ground that Mr. Bayley's infestment, coupled with the provision of the Act,—which declares that a proprietor infest in lands shall be held to be entered with the nearest superior, whose estate of superiority according to the law prior to the passing of the Act would not have been defeasible,—had the effect of sweeping away the mid-superiority which had existed in the person of Mr. Bayley's ancestor, and consequently that that estate of mid-superiority was not available to Mr. Bayley as a means whereby to evade the superior's claim to a casualty.

The case of *Ferrier*, therefore, it will be seen, decided a purely technical point of conveyancing practice as altered by the Act; while *Mackintosh's* case decided a broader point of law, and affirmed the right of an heir, holding and being infest on a conveyance from his entered ancestor, to be received by the superior, notwithstanding his singular title, on payment of an heir's relief. The two cases are not, therefore, contradictory one of the other. Indeed, in *Mackintosh's* case, Lord Mure said the point discussed in it was not before the Court in *Ferrier's* case, and was then, therefore, still open. *Ferrier's* case, however, is still a ruling case as to the effect of the Act on defeasible mid-superiorities; but as defining the rights and obligations of a superior and the heir of his entered vassal under circumstances similar, in their leading features, to those out of which it arose, it is superseded by the decision in *Mackintosh's* case.

In *Rossmore's Trustees v. Brownlie and others*, 23rd November 1877, the question as to the effect of the Act on defeasible mid-superiorities came up again. Here the defenders, who had acquired the lands of Monkcastle by purchase, and were infest, sought to put forward the heir of the last-entered vassal for entry with the superior, in answer to a demand on them by the latter for a casualty. The First Division (diss. Lord Deas) negatived the right of the defenders to interpose the heir of the last-entered vassal between themselves and the superior. The Lord President, in speaking of the effect of the Act on an infestment taken

by a purchaser in the position of Mr. Brownlie in this case, says: "The effect is to subject that purchaser to the liabilities of an entered singular successor, and consequently, where the entry is untaxed, to the payment of a composition. The object of this statute is to simplify conveyancing, and for that purpose it plainly contemplates, among other things, that, as far as possible, all barren and useless estates of mid-superiority shall be extinguished."

In *Sivwright v. Straiton Estate Company*, 12th June 1878, the superior had, in 1873, granted a Precept of *Clare Constat* in favour of the heir (who was still alive) of the last-entered vassal, but no infeftment followed on it. The Court (Second Division, affirming Lord Adam's judgment) held that the defender's subsequent recorded disposition had, by the operation of the Act, swept away the personal title created by that Precept, and that on other points the case was ruled by the decisions in *Ferrier's Trustees'* case and that of *Rossmore's Trustees*.

We now come to the important case of *Lamont v. Rankin's Trustees*, 26th February 1879 (affirmed, House of Lords, 27th February 1880). In this case the various clauses in the Act affecting the vassal's right to escape payment of a casualty, by presenting the heir of the last-entered vassal in the mid-superiority, were of new submitted, and received, after full argument, a final interpretation by the Court. Certain other and special issues were raised, and decided; and as the decision arrived at is not only important in itself, but led to the passing of the Act of 1887 amending the Act of 1874, the facts of the case call for special notice. The late Patrick Rankin of Auchingray, who was proprietor of, and entered vassal in, the lands of Achagoyle, of which the pursuer was the superior, left a general trust-disposition and settlement in favour of trustees, who took infeftment upon it. The purposes of the trust were the payment of certain debts, and after these were extinguished, the trustees were directed to execute an entail of the lands of Achagoyle on a certain series of heirs. Under that entail Patrick Rankin, jun., the truster's heir-at-law, if then alive, was to be the institute, but failing him and his heir-male, the lands were to pass to other parties who were not in the line of the truster's heirs-at-

law. The truster died in 1873, and in 1878 the superior raised an action against the trustees as singular successors infest in the lands, and consequently entered by the operation of the Act, for payment of a year's rent in name of casualty. To that demand two defences were stated: one, on the record, that the heir of the last-entered vassal being willing to enter, the superior was bound to accept his entry, and was entitled to relief duty only; and the other, advanced in the course of the discussion, that although the trustees might not be entitled to put forward the heir, they were, as they held the lands truly for behoof of the truster's heir-at-law, not liable as singular successors for a casualty, but were liable only in relief duty. The first defence was not—in consequence of the decisions in the case of *Ferrier's Trustees*, and the cases which followed it—insisted on in the Scotch Courts, but it was reserved; and on the second defence the Lord Ordinary (Lord Curriehill) decided, that as the trust-disposition and settlement contained *inter alia* a power of sale, by the exercise of which the succession of Patrick Rankin, jun., to the lands might be defeated, and that as, from the time which might elapse before the entail fell to be executed, he might not ultimately be the party entitled to succeed, the trustees could not be said to hold solely, or even in the first place, for the heir-at-law of the truster. He accordingly decerned against the trustees, but reserved his judgment should a case in which trustees held strictly for the heir-at-law, without power of sale, ever arise. The Court (First Division), with the exception of Lord Young, who strongly dissented from the views of the majority of the judges who decided *Ferrier's Trustees* and the other similar cases as to the effect of the Act, adhered to the judgment of the Lord Ordinary. On appeal to the House of Lords, the judges, Lord Chancellor Cairns, Lord O'Hagan, and Lord Blackburn, unanimously affirmed the judgment of the Court of Session. In the appeal, the plea that the trustees, as holding for the heir-at-law, were entitled to be received by the superior on payment of relief duty, was not insisted on; and the case was accordingly tried solely on the question of the effect of the 4th section of the Act; and in particular on the construction and effect of the last clause of sub-sec. 3,—

which provides that the superior shall not be entitled "to demand any casualty sooner" than he could have done under the old law or the conditions of the feu. The judges in the Court of Appeal seem to have arrived at their joint-conclusion by different paths; but the result is the same. Thus the Lord Chancellor and Lord O'Hagan, while adopting the view taken by the majority of the judges in the Court of Session as to the effect of the implied entry introduced by the Act on defeasible estates of mid-superiority, founded their judgments more particularly on an interpretation of the saving clause at the end of sub-sec. 3. They both point out that that sub-section is a protection to the vassal against a demand for a casualty being made on him before the date at which, under the former law, his liability for it would have emerged, but that it does not prevent the superior from insisting on the fuller amount of casualty which the altered state of the law entitles him to. Lord Blackburn, on the other hand, bases his judgment on the effect of the Act on these defeasible mid-superiorities; and he holds that, as the Legislature swept away the nominal mid-superiority, through the existence of which alone vassals in the position of *Rankin's Trustees* could defeat the superior's claim for a casualty, and as no other form has been substituted in lieu of it, the law must be held to be altered in favour of the superior to the extent of entitling him to exact a casualty where circumstances similar to those in this case exist.

There is no reservation in the judgment of the House of Lords similar to that made by Lord Curriehill. Consequently the effect would have been, if this decision had been allowed to stand unmodified, that the interposition of a temporary trust title, even although the grantor's heir-at-law was to be the first and only beneficiary, would have deprived the heir-at-law of the right to protect himself by entering as vassal, or of claiming to be received on payment of relief duty, as he could have done if the conveyance was to himself direct. Cases of this kind are, however, now provided for by the Conveyancing (Scotland) Amendment Act, 1887, which regulates the terms on which trustees holding, either immediately or contingently, for the heir are to enter.

Before passing from this part of the subject, and entering

upon the cases applicable to the section empowering vassals to redeem their casualties, it is proper to note the decision in *Straiton Estate Company (Limited) v. Stephens*, 14th December 1880, as to the import of the clause in a disposition obliging the seller to relieve the purchaser of casualties. This case was heard before seven judges; and the decision in it overrules the law laid down by Lord Curriehill in *The Leith Heritages Company v. The Edinburgh and Leith Gas Company*, previously noted. The facts of the *Straiton Estate Company* are shortly these: The Company purchased the estate of Straiton from the defender Stephens in 1876; and the seller granted in favour of the purchaser a disposition of the lands in ordinary form, and containing the statutory short form of obligation of relief from casualties. At the date of that disposition the subjects were in non-entry; or rather, to put it more correctly, Stephens was entered with his superior by force of the statute, and a casualty was outstanding. That casualty was demanded from the purchaser in 1887; and, having paid it, he raised an action of relief against the seller. The Court (Second Division), with the consulted judges, reversing the judgment of Lord Curriehill, held that the effect of the Act on the previously unconfirmed title of Stephens, the seller, was to make the then outstanding casualty due and prestable; and that on being called upon to do so, he was bound, under his obligation of relief, to relieve the disponee of it. Lord Shand and Lord Young both held that he would have been so bound, even although there had been no clause of relief.

In the cases which now fall to be noticed, bearing upon the section of the Act empowering the vassal to redeem the casualties of his feu, the questions between the parties refer, except in one case, to the basis on which the casualty should be fixed. Along with the decisions on cases arising directly out of the Act, we propose to take the decisions in other cases which have arisen since the Act came into operation, and which have a direct bearing on the question in hand.

The first case under the 15th section decides an entirely new point of law. Before the Act came into operation, the casualties of a feu were only redeemable by mutual arrangement; and that arrangement, unless by an overlook, would

naturally embrace all details incident to the transaction. The Act, however, confers power on the vassal to redeem; without regulating any details of the redemption, except that the price is to be in certain cases (all outstanding casualties being paid) one year's casualty plus 50 per cent., and in other cases two and a half years' casualties. These provisions, it is obvious, left many points open for arrangement, and, failing arrangement, for adjudication by the Court. The first case, being the one to which we referred to in the last paragraph, is that of *The Edinburgh Roperie and Sail Cloth Company v. The Magistrates and Town Council of Edinburgh*, 10th July 1877 (affirmed, House of Lords, 12th November 1878). Here the pursuers were the vassals infeft, and impliedly entered in certain subjects which formed part of an original subject, the proprietors of which had been entered with the superior by Writ of Confirmation. That subject again was part of an original feu, or rather of what had at one time been several feus; but these various divisions and sub-divisions do not affect the question, except to the extent that the pursuers' property was part of a larger subject, the vassals in which had been expressly entered with the superior. The superior had not allocated upon the portion of ground belonging to the pursuers any portion of the original feu-duty; although, in a question between them and the parties from whom they acquired their property, the pursuers were bound to pay the whole feu-duty. The pursuers elected to redeem the casualties; and they tendered one year's rent of the part of the property of which they were proprietors, with 50 per cent. added. The superior claimed redemption money equal to a year's rent—not of the pursuers' portion of the property, but of the whole subjects in which he had formerly given an entry, by Writ of Confirmation, to the pursuers' authors—with the statutory percentage added. After lengthened arguments, the Lord Ordinary (Lord Young) decided in favour of the pursuers, and his judgment was affirmed by the First Division, and afterwards by the House of Lords. The *ratio* of the decision is explained by Lord Selborne. After adverting to the undoubted liability attaching to a portion of a feu for the undivided feu-duty of the whole, as settled in *Wemyss v. Thompson*, 19th January 1836, his Lordship points out that

no similar claim was ever made on behalf of a superior for an indivisible casualty; that, on the contrary, the measure of the superior's right to a casualty was the rent of the particular portion of land in which he was bound to grant the vassal an entry; that the Act operated as a Writ of Confirmation of the pursuers' infeftment in the lands belonging to them; and that consequently the pursuers were only bound to pay a casualty corresponding to the rent of their own portion of the original feu, and that a claim on the part of the superior for any casualty beyond that was untenable.

We now pass to a series of cases in which the Courts were called upon to define the rules by which, in the special circumstances out of which each case arose, the superior's right to a casualty fell to be measured.

The case of *Allan's Trustees v. The Duke of Hamilton*, 12th January 1878, decided the general principle, that, in fixing the amount of a casualty, the rents or returns from the minerals being worked from the lands must be taken into account. It was, however, observed by Lord Ormidale and Lord Gifford, that, as mineral rents or returns represent the substance rather than the fruits of the soil, the amount of casualty, so far as the minerals were concerned, should be arrived at by taking interest, suggested by Lord Gifford at the rate of 4 per cent., on the capitalized value of the average returns for a series of years.

These observations were given practical effect to in the case of *Sivwright v. Straiton Estate Company (Limited)* (*supra*), where the Lord Ordinary (Lord Adam) in the course of the proceedings, and under date 24th March 1879, on the report of an accountant as afterwards modified by the report of a mining engineer, fixed the mineral rent, as for a casualty, at 4 per cent. on the capitalized value—taken in one set of minerals at ten years', and in another class of minerals at fifteen years' purchase—of the average royalties or returns for two years (being the only period for which reliable returns were extant) from the working.

In the above case there was not a fixed rent; but in the case of *Sturrock v. Smith or Carruthers and others (Carruthers' Trustees)*, 21st May 1880, there was a fixed rent payable for the minerals, and as there was not any allegation of an

immediate prospect of these becoming exhausted, the Court (Lord Ormidale) refused a motion for a remit to a man of skill to strike an average value; and fixed the rent payable under the lease as the annual mail.

In *M'Laren and others (Trustees for the Barony Parish of Glasgow) v. Burns*, 18th February 1886, no minerals were being worked from the lands—or ever had been—and the Court refused a motion for an inquiry as to whether any existed or were workable to profit.

These four cases may therefore be taken as settling the principle that mineral rents or royalties fall to be included in estimating the annual value of subjects in fixing a casualty; and also as fixing the rules by which, in varying circumstances, the annual value to be put upon the minerals is to be arrived at.

In *Stewart v. Bulloch*, 14th January 1881, the Court (First Division) held that the rent of shootings, if they are of appreciable value, although they may be unlet, is to be included in fixing the annual rent as for a casualty.

In the two cases of *Hill v. The Caledonian Railway Company*, 21st December 1877, and *M'Laren and others (The Barony Parish Trustees) v. Burns* (*supra*), the Court was asked to determine the annual value to be put upon subjects which were occupied for special purposes. In *Hill's* case the land was covered by part of a line of railway; and the Court held that an equitable mode of ascertaining the annual value of the property, in respect of which the superior was entitled to a casualty, was to take interest at 4 per cent. on the price of the land—exclusive of certain items—and on the cost of construction; and to hold the interest so arrived at—but under the usual deductions and the cost of maintenance—as the casualty. In the *Barony Parish Trustees'* case, the buildings erected on the lands were used as an hospital. The parties declined to take the rent on the Valuation Roll as a criterion; and asked for a remit to a professional valuator to assess the value. The valuator reported that, for the special purposes of the Board, the annual value of the subjects was £2007; while their annual value in the market would be represented by a rent of £1350. The Court took the latter sum as the measure of the vassal's liability.

An important question as to what was to be included as

heritable, in fixing the rent on which a casualty, payable for a public work, was to be based, arose in the case of *Marshall and others v. The Tannoch Chemical Company (Limited)*, 2nd July 1886. The works belonged to, and were in the natural possession of, the vassals; by whom they were used for their business of distillation of wood, the recovery of the resulting products, and for grinding char. They had erected buildings of a more or less substantial character; and laid down machinery, some of which was moveable, but other parts of which was either fixed and heritable, or moveable, according to the point of view from which the question was regarded. The superior claimed that in estimating the casualty a rent should be included for the machinery within the buildings, or placed upon the feu (called for shortness "trade fixtures"), and which could not be removed without causing structural disturbance. The Court held that in fixing the rent as for a casualty, those parts only of the subjects should be included which would have been heritable in a question between landlord and tenant,—not those which would have been heritable as between an heir and executor,—thereby excluding trade fixtures, which, "though they might be fixed to the soil, have no material connection with it, and have been brought there for the particular purpose of carrying on some trade."

In the recent case of *The School Board of Neilston v Barns Graham*, 16th November 1887, a question of law applicable to a very common description of title, and to a concurrence of circumstances which may not unfrequently happen, was decided. A short statement of the facts is necessary to bring out the point submitted to the Court. A person who held certain lands in feu of Mr. Barns Graham—which lands had, up to that date, been used solely for agricultural purposes—gave off a small portion for the erection of a school to the School Board of Neilston, under a contract of ground annual. The agricultural value of the portion of land so given off did not exceed £1, 9s. 2d. per annum; while the ground annual to be paid in respect of it was £15. By the registration of the contract of ground annual in the Register of Sasines, the School Board became entered vassals with Mr. Barns Graham, the superior; and after laying off the ground for building pur-

poses, but before building operations were actually commenced, the Board gave notice to the superior that they would redeem the casualties applicable to their purchase. The question then arose as to whether (1) the agricultural value, (2) the actual worth or yearly value, or (3) the ground annual payable for the lands, was to rule in ascertaining the casualty. The Court held that the casualty fell to be fixed as at the date of the Board's entry with the superior; that the case of *Hill v. The Caledonian Railway* did not apply; and that the agricultural rent—and not the ground annual payable for the subjects—was to be taken as the annual mail. It will be observed that, in consequence of the form which this transaction took, the disponent under the contract of ground annual dropped out of the progress of titles so far as the superior was concerned; and that the School Board, as his disponees, became entered vassals in his stead. Further, that the ground annual—equivalent, it may be assumed, to interest at a certain rate on a sum representing the value of the land as a saleable subject—was payable by, and not to, the superior's vassal; so that it was not a rent payable to the vassal for, but was a burden on, his feu. This case is therefore to be distinguished from the older case of *Cockburn Ross v. Heriot's Hospital*, 6th June 1815, F. C. (affirmed by the House of Lords), in which it was held that, where lands are subfeued for a fair, adequate feu-duty at the time, the superior is entitled to no more than the subfeu-duties; and from the case of *Campbell v. Westenra*, 28th June 1832 (10 S. 734), where lands were subfeued for a small feu-duty, and a grassum was taken, and in which the Court held that the subfeu-duties, with interest at 4 per cent. on the grassum, was the measure of the superior's right in ascertaining a casualty.

In the *Neilston School Board* case it will be noted that the Court struck the casualty as fixed by the rent in existence at the date of the vassal's implied entry; and this leads us to remark on two cases, in each of which the date as at which the casualty fell to be reckoned came under discussion.

The old law on this point stood on the decision in the case of *Heriot's Hospital v. Hepburn*, 27th July 1715 (M. 7998 and 15,057), the report of which bears: "A vassal, who had greatly improved his lands, being to pay his entry, the Lords

found that the present rental (not that which was when the purchase was made) must be the rule;" and sixty years later, in the well-known case of *Aitchison v. Hopkirk* (M. 15,060) (which is noteworthy as first defining the deductions which are to be made from the rent to ascertain the casualty), the same rule was followed.

But in the case of *Steuart v. Murdoch & Rodger*, 6th June 1882, and in that of *Campbell v. Stuarts*, 11th December 1884 (decided in the Outer House, and not carried further), the Court had to consider the question whether the implied entry introduced by the Act altered the old common law rule.

In *Steuart's* case the vassals (the defenders) acquired the lands of Auchterhead, of which the pursuer was the superior, some time prior to January 1873, in which month the defender's immediate author died. The defender's title was thereafter impliedly confirmed when the Act came into operation. In 1880—by which time the rental of the lands had been increased by nearly one-half—the superior raised an action for declarator and payment of a casualty; and a question arose as to the year the rental of which was to be taken as fixing the casualty. The Lord Ordinary (Lord Curriehill)—who gave a lengthened opinion, containing a review of his own judgment in *The Leith Heritages Co. v. The Edinburgh and Leith Gas Co.* case (*supra*), and of the judgment, which overruled it, in *Straiton Estate Co. v. Stephens*, with which judgment Lord Curriehill expressed his concurrence—held that the effect of the implied entry operated by the Act, together with the intention to be gathered from the form (Sch. B.) attached to it, was to make the date of the death of the last-entered vassal the due date of the casualty; and Lord M'Laren, before whom the process came afterwards to depend, decreed in favour of the superior for the rent of that year (1873), subject to the usual deduction, as the casualty due for the lands. The Court, however, found that interest ran on the casualty only from the date of the action.

In *Campbell's* case the facts were different from those in *Steuart's* case, in so far as that in the latter case (as we have seen) the last-entered vassal died before the passing of the Act; while in *Campbell's* case the vassal last entered, and who paid a composition, died in 1876. Lord Fraser, adopting the rule

laid down by Lord Curriehill in *Stewart's* case—with which he expressed his entire concurrence—held that the rent of the year 1876 should be taken as the measure of the casualty. In this case, it should be remarked, the vassal had let the lands; and his tenant had sub-let them at a much increased rental. The Lord Ordinary found that the rent under the principal lease—not the rent under the sub-lease—must be taken in ascertaining the superior's casualty.

The decision in *The Duke of Montrose v. Provan's Trustees*, 25th January 1887, has reference to the construction to be put upon a peculiar clause in a feu-charter, fixing the amount of the casualty according to the possession or non-possession by the vassal for the time of a certain land rental; and is too special in its application to be of general interest.

But there are other three cases, decided since this Act came into operation, the decisions in which have such an intimate connection with the subject we have in hand, that a note of them will not be out of place here.

In *Hervey and another (Morrison's Trustees) v. Webster and another*, 16th May 1878, the Court (Second Division, diss. Lord Ormidale)—reversing a judgment of Lord Rutherford Clark—held that casualties, payment of which was stipulated for on the occurrence of certain events, and which, with interest from the date when the event happened, were declared in the feu-charter to be real burdens, were *debita fundi*, and as such could be recovered under an action of poinding of the ground; while in the case of *Ritchie (Gibson's Trustee) v. Stewart*, 10th December 1880, the Court confirmed and allowed a payment made by a poinding creditor, out of the funds which had come into his hands, of a composition to the superior, which was of fixed amount, on the ground that such a composition was a *debitum fundi*. The third case is that of *The Magistrates of Dundee and others*, 20th November 1883, wherein it was decided (by the Second Division, diss. Lord Rutherford Clark), that a provision in a feu-contract, dated prior to 1874, that the vassal, “besides making payment of the said yearly feu-duty at the terms after mentioned,” should be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year, implied a discharge of the casualties of superiority. The understanding, to which the practice had hitherto conformed,

was that unless the casualties were discharged either expressly or by implication—as, *e.g.* by the introduction of a reference to singular successors in the clause taxing the casualty; or in the stipulation for a periodical payment in addition to the feu-duty—the right to claim casualties remained with the superior. This case, however, puts a different interpretation on the law on this point.

(*To be continued.*)

Correspondence.

THE DISCRETION OF EDUCATIONAL GOVERNING BODIES.

(*To the Editor of the Journal of Jurisprudence.*)

SIR,—Will you allow me to say that I fail to see the logic of your strictures on Sheriff Armour's judgment on the question of the Discretion of Educational Governing Bodies. I have no precise knowledge of the position of the bodies entrusted with such duties by the Educational Endowments Act, but I presume they are pretty much in the position of the trustees originally appointed by the founders. If trustees are directed by a truster to benefit a certain class, can there be any doubt that persons claiming to be included in the class, and alleging that they have been improperly excluded by the trustees from participation in the benefits, are entitled to invoke the protection of the law Courts, unless the deed creating the trust has expressly left the matter to the sole discretion of the trustees?

I understand the principle upon which the Courts proceed in; that they will never assume that redress in the law Courts has been excluded, unless the terms of the deed or statute leave no doubt on the point.—I am, yours obediently,

LAW AGENT.

EDINBURGH, 7th February 1889.

[We indicated no opinion as to whether an appeal to a Court of law is competent; all we remarked was that we could not follow Sheriff Armour's reasoning, that because a matter of fact

has to be decided, therefore there must be an appeal. In many cases an application to a Court of law would undoubtedly be competent. If, for example, a scheme provided that bursaries were to be given only to children in the A. district of a parish, or only to boys, the Court might be applied to to restrain the governing body from giving bursaries to children in the B. district, or to girls. We think it doubtful, however, if the Court has jurisdiction to interfere with the decision of a governing body on what is entirely a matter of opinion as to the degree of indigence warranting the bestowal of a bursary. We adhere to our opinion, that we do not think the Commissioners contemplated that the decisions of governing bodies on these details were to reviewed by a Court of law. We go further, and say that in our view it is not expedient that such review should be encouraged. A School Board is surely in a far more favourable position to judge of the necessities of a family, whom they all know about personally, than a Sheriff in a Small Debt Court. Take it, however, that an application to the Court is in strictness competent, a Sheriff, we think, would do well to treat such an application as the Court treats appeals from the Auditor. If there is no glaring injustice, and if the Sheriff is satisfied that the Board have honestly exercised their judgment in the matter, he ought to decline to interfere, even although his impression may be that, acting independently, he would have disposed of the matter otherwise than the Board has done. We suggest this case to our correspondent. A scheme provides that a prize is to be awarded annually to the writer of the best essay upon a prescribed subject, but there is no provision as to the governing body being the judges of the merits of the essays. That body, however, conceive that they are to be the judges, and they consider the essays sent in, and award the prize to A. Is B. entitled to sue them in Court for the prize on the score that his essay was the best? If not, why not, on the principle that the Court can interfere with the judgment of the Board upon the poverty question? The question whether a man needs assistance to help him to educate his family appears to us just as much a matter of opinion as the question which of a number of essays is the best.—ED. *J. of J.*]

Appointments.

MR. RICHARD VARY CAMPBELL, Advocate (1864), has been appointed *interim* Sheriff of Dumfries and Galloway, in place of Sheriff Norman Macpherson, who has obtained four months' leave of absence.

MR. HECTOR W. MACLEOD, Advocate (1878), formerly Chief-Justice of the Gold Coast, has been appointed Chief-Justice of St. Lucia, in the place of Mr. Carrington, promoted to the Attorney-Generalship of British Guiana.

WHAT is said to be the most lucrative legal post in the Colonial service, the Attorney-Generalship of Hong-Kong, is, it is believed, about to become vacant.

Obituary.

THE LATE ANDERSON KIRKWOOD, LL.D.—We have to record the death at Stirling, on 16th February, of Dr. Anderson Kirkwood, Ex-Dean of the Faculty of Procurators, Glasgow, and Emeritus Professor of Conveyancing in the University of that city. He had reached the advanced age of seventy-seven, and for about two years had in effect retired from the practice of the profession. It is scarcely necessary to remind our readers, especially in the west, that Dr. Kirkwood has for nearly fifty years been a member of one of the leading legal firms in Glasgow, and for upward of thirty years has been unsurpassed as a legal adviser in wisdom, energy, and influence. He was held in the highest esteem by his professional brethren and the community generally, and the utmost confidence was reposed in him by the very wide circle of clients and friends who resorted to him for advice and assistance. His life was active and laborious, chequered by ill health and sorrow, but lightened by the cordial and kindly appreciation of his fellow-citizens, who trusted and admired him.

Feelings of this kind culminated in 1876 in the presentation to him of his portrait, in recognition of private worth, and valuable services, public and private; and he then with

modest frankness told the story of his early life and struggles. From this we learn that he was born in 1812, one of a large family, his father being a merchant in Edinburgh of limited means. After attendance at a parish school, and then at one of the Edinburgh Merchant Schools,—during which time his father died,—he was apprenticed in the accountant's department of a W.S. office in Edinburgh, and attended law classes in the University. His apprenticeship expiring about 1831, he remained in the office till 1839, when, in response to an advertisement, he went to Glasgow, and, at the age of 26, undertook the management of the proper law business of the firm of A. & D. J. Bannatyne, Writers, then immersed in railway enterprises. He grappled manfully with the mass of arrears which had accumulated in their ordinary business, leaving the parliamentary work to the Bannatynes. He was soon found by his employers so full of capacity and self-reliance, that, at the end of the second year, he became a partner. His career thereafter as a lawyer was one of unbroken progress and success. The business rapidly extended under the happy combination which the *personnel* of the firm presented ; and by and by, while the Bannatynes continued to enjoy the cream of parliamentary practice in the west, mercantile and conveyancing business gravitated to the junior partner. As railway business quieted down, the senior partner withdrew, leaving it to the charge of his brother, and shared with Mr. Kirkwood the varied general business of the office, including patent cases, for which the firm became famous. These partners formed a remarkable trio. Power and sagacity, coupled with deliberation in reaching conclusions, were the qualities of the senior. He was the ideal head of a large concern. His brother was a born diplomatist, ready and versatile, tenacious of his purposes, and able to adapt means to accomplish them. Mr. Kirkwood was characterized by rapidity and soundness of judgment, which in combination were truly remarkable. His appreciation of legal relations was almost an instinct. His judgment once formed, he adhered to it, and carried it out without hesitation. Such qualities in a mercantile community are invaluable. The merchant comes to his lawyer, discloses his difficulties, requires a solution on the spot, and is prepared to

act on it at once. Many such consultations took place, involving large sums, and were acted on promptly; and so confidence grew with the exercise—confidence both of lawyer and client. So much was his advice in request in Glasgow, that his business room was often literally besieged all day,—clients waiting two, three, and four deep outside his door. How he kept the multiplicity of business details clear and separate in his mind was a marvel. The thorough trust reposed in him was illustrated by members of the same family, at war with each other, yet each confiding their cares to him, and sometimes meeting, though not on speaking terms, in his waiting room. In such cases he was eminently a peace-maker, at least his advice made for peace. Such unremitting devotion to business brought the revenge inevitable to one possessed of a somewhat delicate constitution, prostration of mind and body laying him aside, from time to time, for weeks or months. But his wonderful recuperative power stood him in good stead, and returning to work, he again plunged in with renewed zest and enjoyment. His uncertain health and the growth of business led to the assumption of Mr. M'Jannet as a partner, whose sound judgment and methodical and steady application proved invaluable in such a concern.

The two greatest distinctions of his life were his call, in 1862, by the unanimous voice of his brethren, to the newly instituted Chair of Conveyancing in the University of Glasgow, a post which he held for five years; and his appointment in 1875 as Dean of the Faculty of Procurators in Glasgow, which was also unanimous. This office he held, as his partner Mr. Andrew Bannatyne had done, for the prescribed period of five years. On his retiral from the professorship in 1867, he received from the University the honorary degree of LL.D., and was elected by the General Council as their Assessor in the University Court. His services in that capacity were, in the testimony of Principal Caird and other members, simply invaluable, and were continued by successive renewals till 1887, when failing strength warned him that he should relinquish public work.

While he held this office, he was requested, in 1876, on the appointment of Lord Gordon as a Law Peer, to stand as Liberal candidate for the parliamentary representation of the

Universities of Glasgow and Aberdeen. He entered on the struggle with characteristic energy and hope, but he was out of health at the time, and could not do himself justice in the contest. His adversary, the Lord Advocate (now Lord Watson), obtained the seat with an increased majority. The contest was conducted with the utmost good feeling on both sides, each holding his opponent in high esteem, none the less that Mr. Watson was son-in-law of Dr. Kirkwood's late partner, Mr. Dugald J. Bannatyne.

As years advanced, and indeed from a comparatively early period of his career, Dr. Kirkwood was largely consulted as a chamber counsel, or referee, by his professional brethren on behalf of clients; and latterly he was a frequent umpire in railway and other arbitrations. On all such occasions his thorough grasp of the case and his absolute impartiality were equally conspicuous. Without enlarging on the many interesting traits of his character, among which the thorough honesty and candour of his mind were prominent, it is enough to say that the position which he held in Glasgow for many years, whether as trusted law agent, family counsellor, or business adviser, was quite unique. Men of all sorts and conditions, and women too, sought his counsel in adversity, and found him always patient to hear and prompt to advise; and they were generally satisfied to follow the counsel.

Though certainly the least robust of the partners, Dr. Kirkwood has survived them all; for Mr. Dugald J. Bannatyne died at little past middle life in 1863, his brother, Dr. Andrew Bannatyne, at a more advanced age in 1871, and Mr. M'Jannet, who also rose to high rank in the profession, in 1886. Dr. Kirkwood's domestic life was overshadowed by the death of an only child, a son, who he hoped would have followed him in the profession, but whose tastes did not lie in that direction. He entered the army, but was early cut off by fever in the West Indies. The devoted wife and mother survived this blow, but died a few years ago. Dr. Kirkwood was an attached member and elder of the Free Church, and a man of wide and catholic sympathies.

THE LATE MR. PATRICK HENDERSON CHALMERS.—Mr. P. H. Chalmers, Advocate, the senior partner of the firm of C. & P.

H. Chalmers, Aberdeen, died there on the 19th ult., at the age of 49. The deceased was the fifth son of the late Charles Chalmers of Monkshill. Educated at the Universities of Aberdeen and Edinburgh, and trained in the office of Messrs. Tods, Murray, & Jamieson, W.S., Mr. Chalmers settled in Aberdeen in 1862, and he has long held a leading place among the provincial lawyers of Scotland. Mr. Chalmers was law agent to the Aberdeen Town and County Bank, agent and director of several public companies, and clerk to the Lord Lieutenant of the county of Aberdeen. He had also an extensive business as a factor and law agent, and was well known and widely respected throughout the county. The deceased took no prominent part in public matters, his tastes, apart from his profession, lying more in the direction of literary and antiquarian study. He leaves a widow and two children.

MR. PATRICK MURRAY, Advocate (1836), son of the late Sir Patrick Murray, Bart., of Ochertyre, died at Stirling, on 18th ult., at the age of 76.

The Month.

Power of Court to close Street on account of Noise.—The Supreme Court of Appeals of Virginia has held that where the noise of a street is such as to prevent the judge and jury from hearing the witnesses and counsel, it is within the judicial discretion of the Court to close such street. Any judge of the Circuit, Superior, County, or Probate Court, if in the exercise of a sound discretion he found the noise on a street prevented the judge and jury from hearing the witnesses and counsel on the trial of a case, could order it to be closed during the sessions of the Court, and if the mayor should interfere, could put him in jail for contempt.

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Capital Punishment.—The opponents of capital punishment will not be able to glean much encouragement out of the fact that although for ten years the Emperor of Austria did not

sign a death-warrant, he has at length been compelled to return to the practice because of the great increase of crime in his domains. The reason why he refrained so long was said to be owing to the feelings excited by the execution of his brother Maximilian in Mexico. Switzerland, like Austria, was obliged some time ago to revert to capital punishment. Most assuredly the world has not reached a stage at which it would be safe for society to abolish the death penalty.



The Salvation Army.—This ubiquitous body has scored a triumph in an American law Court. The following is the rubric of the report of the decision in the case of *Anderson v. The City of Washington*, pronounced by the Supreme Court of Kansas on 10th November last:—

“An ordinance of a city of the second class that declares it unlawful for any persons, society, association, or organization, under whatsoever name, to parade any public street, avenue, or alley of the city, shouting, singing, or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended, or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues, or alleys, without first having obtained in writing the consent of the mayor, or, in his absence, the president of the city council, city clerk, or city marshal, in the order named, authorizing such parade, is of doubtful delegated power, is unreasonable, does not fix the conditions uniformly and impartially, contravenes common right, and is illegal and void.”



Judges' Robes.—The Supreme Court of Pennsylvania appeared for the first time in robes on January 7th. According to the *Chicago Legal News*, this is “going back to the Dark Ages.” The *Albany Law Journal*, on the other hand, pokes fun at the growlers:—

“Now arise, ye Pennsylvanian newspaper Solons, in your wrath, and sling your ink! The Pennsylvania Supreme Court, unmindful of the traditions and proprieties of our great

democracy, and in a spirit of shameful and craven and dwarfish subserviency and imitation of the revolting customs of the effete monarchies of Europe, have decided to put on gowns. Thus we go—first the Federal Supreme Court, then the New York Court of Appeals, and now the great Quaker Court. If this sort of thing goes on, we shall expect to see representatives in Congress refraining from smoking on the floor during sessions, and from squirting tobacco juice down the register or on the carpets. There is danger that we are growing too ‘particular’ for a free people.”

* * *

Madness and Murder.—In an article under this head in the December number of the *North American Review*, Dr. Hammond advocates the execution of homicidal maniacs. Speaking of the Whitechapel murderer, he says:—

“When arrested, the question of how to dispose of him will arise. In what I have said I have assumed him to be a lunatic of some kind. If a certain degree of maudlin sentimentality should prevail, he will be placed in a lunatic asylum, and in the course of a few years may be discharged as cured. But such insanity as his is never cured. Doubtless while an inmate of the asylum, his conduct will be of the most exemplary character. He will dissemble for years, and will deceive the very elect among experts in insanity. Superintendents and clergymen and various other high personages will unite in testifying to his thorough change of heart and Christian bearing, and when he is discharged, with the blessings of all with whom he has been associated, he will begin to commit another series of murders fully as atrocious as those for which he has been sequestered. There is but one way to deal with a person like this Whitechapel murderer, and that is to hang him as soon as he is caught. He is an enemy of society, and is entitled to no more consideration than a wild beast which follows his instinct to kill. Laws are not made for the purpose of enforcing the principles of abstract justice; they are enacted solely for the protection of society.” “A man with murderous tendencies, which he is unable to restrain, is as much an enemy to society as a ferocious tiger or a mad dog, and ought to be dealt with in quite as summary a manner as

we deal with these animals. It is all very well to talk of the inhumanity of such a proceeding, and to urge sequestration in a lunatic asylum as amply meeting the requirements of the case. But experience teaches us that though it may be very difficult for a sane person improperly committed to get out of an asylum, it is the easiest thing in the world for a lunatic who has committed a crime to walk out of its doors with the full consent of the superintendent." "Every one is responsible who knows the nature and consequence of his act."

When the Whitechapel murderer is caught we shall be glad to discuss with Dr. Hammond the question of how to dispose of him.

* *

"Politics" and the Profession.—*The Tipperary Nationalist* of 6th February contained the following:—"Our local solicitors will not forget the outrageous conduct of the Q.C.'s and B.L.'s frequenting Assizes and Quarter Sessions in this country, who attended the banquet to Mr. Balfour on Saturday, and laughed so uproariously over his ribald gibes at Mr. W. O'Brien. If they do, we promise them they will hear from us again. Litigants, too, ought to insist that advocates, be they solicitor or counsel, should be neither Emergency tools nor Castle hacks."

* *

Lord Shand.—His Lordship has, it is understood, obtained leave of absence for the remainder of the winter session, and has gone to the South of France. We are glad to believe that this is only a precautionary measure. As will be remembered, Lord Shand had last year a very severe illness, which compelled him to spend the greater part of the winter in the South. Although, fortunately, his Lordship recovered from the acute attack, he has not since been so robust as to render it prudent for him to face the March winds this season. We trust that his Lordship's second visit to the South will thoroughly fortify his constitution, and that he will find that Biarritz has not forgotten golf or its benefactor.

Reviews.

The Faculty of Law in the University of Glasgow. By W. G.

MILLER, LL.B. Glasgow: John Smith & Son.

MR. MILLER'S pamphlet is addressed more particularly to the lawyers of the West of Scotland, but it ought to appeal to all who believe that law is something more than a mere trade. According to Mr. Miller's showing, the Glasgow law students, who average annually 224, have to be satisfied with the smallest amount of teaching that could possibly be dignified with the name of a university education in law. They are ministered unto by two and a half professors—but one ought to be counted twice—and two lecturers. It may be that the 224 might not all desire to attend the lectures delivered from the 15 chairs, with which Mr. Miller, following Lord Reay, would be satisfied as an efficient Faculty of Law, but they have surely a right to expect that a university granting degrees in law will supply a full course of teaching in each of the subjects embraced in these degrees. These degrees are handled by Mr. Miller in a far from tender manner, the B.L. being described as "the peculiar product of an age of adulteration and shoddy." Yet if the LL.B. were to be expanded as proposed by him, the number of graduates would probably fall lower than it is at present, for the number of law students who can afford to devote four full years to university classes is small. Were the present LL.B. subjects taught more fully, and were additional subjects required for honours, there would be small ground for the existing complaint. The only fault that can be found with Mr. Miller's views is that they are perhaps somewhat too hopeful. For the way in which he exposes the weakness of the present system, he deserves the thanks of the profession, and it will be a misfortune if no serious attempt at reform is made as the result.

The American Lawyers' Reports, Annotated.—The Lawyers' Co-operative Publishing Company, of Rochester, N.Y., have announced their determination to abandon the publication of their series of Reporters, consisting of the *New England*

Reporter, the *Central Reporter*, and the *Western Reporter*, embracing the reports, in full, of the decisions of the highest appellate Courts of twenty States, and have substituted therefor a series of select reports of current decisions of the United States, State and Territorial Courts, edited by Mr. Robert Desty, with the aid of a corps of assistants, to be called the *Lawyers' Reports, Annotated*. Keys to this new series of reports are to be furnished in the form of a semi-monthly digest, and also of an annual digest, which will contain references to all important publications and to English and Canadian cases. The aim is to proceed upon some principle of selection, giving the best cases, instead of printing everything, as has hitherto been done. From the specimens before us, this work, which is a very large one, appears to have been set about in a very thorough and careful manner.

English Decisions.

TRADE MARK.—*Registration—Non-User—Abandonment—Evidence of intention to abandon—Descriptive word—Patents, Designs, and Trade Marks Act, 1883* (46 and 47 Vict. c. 57).—A perfumer, who sold perfumed cream under the name "Emollio," died in 1867. It did not appear that after his death any of the cream was sold, and in 1870 his son destroyed the labels. An application was now made by the son to have the word "Emollio" registered, on the ground that the word was a "special and distinctive word, used as a trade mark before the 13th August 1875," within the meaning of sec. 64, sub-sec. 3, of the Patents, Designs, and Trade Marks Act, 1883. The application was opposed by persons who sold a soap by the name of "Emolline." They contended that the use of the word "Emollio" as a trade mark previously to 1875 had been abandoned. *Held*, that the use of the word "Emollio" on the labels on the perfumed cream had been abandoned not only by cessation of the user, but by the destruction of the labels in 1870, whereby an intention to abandon was clearly indicated. *Held*, also, that it was a doubtful question whether a word such as this, which was descriptive of the effect of using the particular article, could be considered to be "used as a trade mark" within the meaning of sec. 64, sub-sec. 3, of the Act, and also whether the use of the word as claimed would not be "calculated to deceive" within the meaning of sec. 73.—*Re Grossmith's Trade Mark*, Ch. Div. (Kay, J.), 11 and 12 Jan. 1889.

BUILDING SOCIETY.—*Building Societies Act, 1874—Investing member—Withdrawal of member—Winding-up order—Liability of*

member for arrears not paid up before winding-up order.—By the rules of a Building Society, any investing member, on giving ten days' notice in writing prior to the first Monday in any month, might withdraw the whole or the part of the amount due to him. Certain investing members, whose shares were not fully paid up, withdrew from the Society, and shortly afterwards an order was made for winding-up the Society. It was sought to make the investing members who had withdrawn from the Society liable to contribute to the assets of the Society the amount unpaid on their shares at the time of their withdrawal. *Held*, that as the members were at liberty according to the rules to withdraw from the Society, they were not liable to contribute, having ceased to be members of the Society before the winding-up order was made, and that they were not liable under sec. 200 of the Companies Act, 1862, as the Society was not an unregistered company within the meaning of the section.—*Re Sheffield and South Yorkshire Building Society*, Q. B. Div. (Cave and Charles, J.J.), 18 Jan. 1889.

INSURANCE.—Accident—Death from illness following upon accident.—A. was insured for £500 against accidental death. On the 24th October he fell, and dislocated his shoulder. He was taken home, and was unable afterwards to leave his bed. On 22nd November he died of pneumonia. It was found in fact that A. would not have died as and when he did, but for the accident, and that the pneumonia from which he died arose from his catching cold during his illness from the accident, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident. *Held*, that A. died from the effects of the injury within the true meaning of the policy of assurance, and that the Company were liable to pay the sum of £500 assured by such policy.—*Re Isitt v. Railway Passengers' Assurance Company*, Q. B. Div. (Huddleston, B., and Wills, J.), 17 and 18 Jan. 1889.

COMPANY.—Poll.—By one of the articles of association of a company it was provided, "All questions at general meeting shall be decided by a show of hands, unless a poll be demanded, in which case such poll shall be held at a time and place to be fixed by the Directors within seven days from the date of the meeting." *Held*, that the taking of the poll then and there at a general meeting, immediately after a resolution had been put to a show of hands and a poll had been demanded, was a direct violation of the articles of association, and was illegal.—*Re The Flax Producers' Company Limited*, Ch. Div. (Kay, J.), 19 Jan. 1889.

BILLS OF EXCHANGE ACT, 1882.—Notice of dishonour.—By sec. 49, sub-sec. 12, of 45 and 46 Vict. c. 61, "Notice of dishonour may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter." By sec. 50, sub-sec. 12, "Notice of dishonour is dispensed with (a) when, after the exercise of reasonable diligence, notice as required by this Act cannot be given to, or does not reach, the drawer or indorser sought to be charged." *Held*, that inability to give notice of dishonour, after the

exercise of reasonable diligence at the time the bill is dishonoured, does not dispense with notice of dishonour if such notice can be given before an action is brought.—*Studdy v. Beesty & Higgins*, Court of Appeal, 20 Jan. 1889.

CONTAGIOUS DISEASES (ANIMALS) ACTS, 1878 and 1886.—*Rabies in dogs*—*Order by Privy Council*—*Scope of the Acts*.—The appellant was convicted by Justices of Cheshire of allowing a dog to be at large without having a muzzle, in contravention of an order as to rabies made by the Privy Council under the Contagious Diseases (Animals) Acts, 1878 and 1886. It was contended on his behalf that the object and scope of these Acts was the prevention and detection of contagious diseases in cattle, horses, etc., and that rabies in dogs not being a disease *ejusdem generis* with those enumerated in the Acts, the order under which the appellant was convicted was *ultra vires*. *Held*, that the order of the Privy Council was within the powers conferred upon them by the Act, and that the appellant was properly convicted.—*Bellhouse v. Leighton*, Q. B. Div. (Coleridge, C. J., and Hawkins, J.) 22 Jan. 1889.

LIBEL.—*Trustees and executors*—*Personal liability for slander in newspaper, the property of trust estate*.—Where part of a testator's estate consisted of a newspaper, which his trustees and executors were directed to carry on,—*Held*, that whilst the trustees and executors were personally liable in damages for a libel appearing in the newspaper, they were entitled to be indemnified out of the trust estate where the cause of action arose against them in the due discharge of their duties as trustees and executors.—*Baily v. Baily*, Ch. Div. (Chitty, J.), 19 and 26 Jan. 1889.

GAMING.—*Licensed premises*—*Licensing Act, 1872*.—The appellant, a spirit merchant, suffered to be played on the billiard table on the licensed premises a game called "skittle pool." The players on the commencement of the game each paid a certain sum into the pool, and also a halfpenny each for the use of the table, the winner of the game receiving the total amount in the pool. *Held*, that playing a game for money is "gaming," and that the appellant was therefore rightly convicted of suffering gaming in licensed premises under 35 and 36 Vict. c. 94, sec. 7.—*Dyson v. Mason*, Q. B. Div. (Hudleston, B., and Willis, J. 1), 28 Jan. 1889.

MARINE INSURANCE.—*Warranty*—*Interpretation*—*Evidence*—*Onus*.—A policy of insurance upon a ship contained the following warranty: "No iron, or ore, or phosphate cargoes to be carried across the Atlantic." In an action upon the policy, the underwriters contended that they were relieved from liability, as the ship at the time of the loss was carrying a cargo of steel across the Atlantic. *Held*, that the word "iron" being capable of including steel in its meaning, the onus lay upon the plaintiffs to show that the commercial use of the word "iron," when used in a warranty amongst persons engaged in the business of insurance, did not include steel; and that evidence to show that the use of the word iron in other commercial documents would not be understood by men of

business to include steel, was insufficient.—*Hurt v. Standard Marine Insurance Company*, Court of Appeal, 28 Jan. 1889.

WIFE'S ANTENUPTIAL DEBTS.—*Restraint on anticipation*.—*Held*, that any property belonging to a married woman for her separate use is liable to satisfy her antenuptial debts, notwithstanding that she is restrained from anticipating such property.—*Axford v. Reid*, Ct. of App., 30 Jan. 1889.

TRADE MARK.—*Registration—Prior use—Patents, Designs, and Trade Marks Act*, 1883 (46 and 47 Vict. c. 57, sec. 73).—Application was made by D. for registration of two trade marks for baking powder, both of which comprised conspicuously the words "fruit salt." The application was opposed by E. on the ground of his prior uses of the term "fruit salt" for a saline medicinal preparation. *Held*, that as D. admitted knowledge of the exclusive use by E. of the words "fruit salt" before D. adopted these words, and D. was not able to point to the words in any book on chemistry, the case fell within sec. 73 of the Act, and the application must be refused.—*Eno v. Dunn*, Ch. Div. (Kay, J.), 31 Jan. 1889.

TRADE MARK.—*Registration—Use—Words calculated to deceive—Patents, Designs, and Trade Marks Act*, 1883 (46 and 47 Vict. c. 57, secs. 72 and 73).—*Held*, that if there was any possibility of the public being deceived by a trade mark into believing that the goods manufactured or sold by one merchant were the same as goods manufactured or sold by another merchant, it was the duty of the comptroller to declare that the trade mark ought not to be registered, and that the comptroller ought to exercise the power given him by the Act in a wide and comprehensive manner. *Held*, also, that as the statute provided that if the exclusive use of the words was calculated to deceive, the comptroller was not to register them; and that as it was obvious that the words "Golden Fleece" would be calculated to deceive when used with respect to wine, having previously been used with respect to spirits, the comptroller ought not to register those words.—*Australian Wine Importers Limited v. Mason*, Ch. Div. (Kay, J.), 1 Feb. 1889.

SETTLEMENT.—*Life interest—Alienation—Forfeiture—Inconsistency*.—By a marriage settlement the annual income of the trust fund was given to the husband "and his assigns" for his life, or until he should make or attempt to make any assignment of the income or any part thereof, or to charge or to encumber or attempt to charge or encumber the same, or until he should become bankrupt. The husband mortgaged his life interest. It was contended that the addition of the word "assigns" was that the husband's life interest was absolute, and the forfeiture clause void. *Held*, that the result of giving so wide a meaning to the word "assigns" would be to render nugatory the rest of the proviso which was aimed against alienation. *Held*, therefore, that the mortgage operated so as to work a forfeiture of the life interest.—*West v. Turner*, Ct. of App., 1 Feb. 1889.

SETTLEMENT.—*Power of appointment—General gift by will.*—A. was entitled under a will to the income of real estate for life, and after his death the property was directed to be sold, and power was given to him by will to appoint the income of the proceeds of sale to his wife. By his will, which did not refer to this power, A. gave all his real and personal estate to his wife absolutely. He had no real estate of his own, except what he took under the will, either at the date of his will or of his death. *Held*, that the will was not an exercise of the power.—*Foulkes v. Williams*, Ct. of App., 4 Feb. 1889.

TRUSTEES.—*Breach of trust—Improper investment—Liability of trustees to replace stock.*—Trustees sold consols in 1875, and made an unwarrantable investment of the proceeds. No loss, however, resulted. Consols meanwhile rose very much in value. *Held*, that the trustees were bound to replace either the actual amount of consols or the proceeds of the sale, in the option of the beneficiaries; and that as the beneficiaries chose the former alternative, the trustees must buy consols to the amount sold in 1875, although this would cost much more than the sum realized for them in 1875.—*Clark v. Trelawney*, Ch. Div. (Kay, J.), 7 Feb. 1889.

ADMINISTRATION.—*Direction to executors to carry on business—Right of executors to indemnity—Relative rights of creditors of testator and subsequent creditors.*—Under an agreement made in 1874, the plaintiffs were creditors of G. At the death of G. the debt remained unpaid, and his assets were not sufficient to meet this and his other liabilities. By his will, G. directed his executors to carry on his business, and after his death they, in doing so, became personally liable for certain goods sold and delivered, and in respect of certain other matters. *Held*, (1) that as regards the assets of the testator existing at the time of the testator's death, the creditors of the testator were entitled to priority over any claim of the leading executors to an indemnity, in respect of the liabilities in respect of the trading, except so far as the indemnity was sought in respect of the cost of realizing the original assets; (2) that as regards such original assets the creditors of the executors in the business had no lien or claim as against the creditors of the testator; (3) that as regards the subsequently acquired assets (and the original assets so far as unexhausted by the testator's debts), the executors were entitled to an indemnity in respect of the liabilities personally incurred by them in trading; (4) that so far as the indemnity extended to the after acquired property, the subsequent creditors had a right to stand in the shoes of the executors and take the benefit of the indemnity to the extent of their debts; (5) that the creditors of the testator could only claim to be paid out of the subsequently acquired assets after satisfaction of the indemnity; (6) that the creditors of the executors could not make any claim to be indemnified out of the estate in the hands of the executors, if the executors were themselves indebted to the estate, so that they had that in their own pockets, out of which they ought to take indemnity.—*Douse v. Gorton*, Ct. of App., 7 Feb. 1889.

Sheriff Court Reports.

SHERIFF COURT OF ORKNEY.

Sheriff ARMOUR.

BURROUGHS *v.* WORK.

Crofters' Holdings (Scotland) Act, 1886—Fair rent—Draw back—Arrears.—*Held*, that the provision in the Crofters Act, that when the fair rent is less than the old rent, the tenant is to be entitled at the next payment of rent to deduct from the fixed rent the amount of any payments in excess of the fair rent which he may have made since the date of application to the Commission, applies only to the case where the crofter has actually continued to pay the old rent pending the application, and that a crofter who has not paid his rent in the *interim* must pay at the old rate up to the next term after the fair rent has been fixed.

This was an action by Major-General Burroughs of Rousay, against William Work, one of his crofters, for the half-year's rent and an instalment of arrears, ordered by the Commissioners to be paid, due at the term of Martinmas. The Commissioners had dealt with the arrears up to the term of Whitsunday, and had fixed a fair rent at a reduced rate. The defender, who during the dependence of the application had paid no rent, pleaded that the rent for the half-year in question, being the half-year during the currency of which the fair rent was fixed by the Commissioners, was not the old rent, but the fair rent as fixed by the Commissioners. The contentions of the respective parties appear sufficiently from the note of the Sheriff-Substitute, who decerned against the defender for the full amount sued for.

Note.—In this case the defender, who is a crofter within the meaning of the Crofters' Holdings (Scotland) Act, 1886, applied to the Commission to have a fair rent fixed. His notice of application was dated 23rd February 1887, but the order of the Commissioners fixing a fair rent and dealing with arrears was not issued till 28th September 1888, when the original rent of £7, 3s. 6d. was reduced to £4, 10s., and arrears to the extent of £5, 10s. cancelled, leaving £10 still due. The defender is willing to pay the arrears, but he contends that the rent due at Martinmas last (the first term after fixing the fair rent) is the fair rent only, and not the original rent which the pursuer now sues for. The only question for decision is, therefore, whether the old or the fair rent is legally due. The provisions of the Crofters' Holdings Act which bear on the question are the second and third sub-sections of section 6. Sub-section 2 enacts—'The rent fixed by the Crofters Commission (in this Act referred to as the fixed rent) shall be deemed to be the rent payable by the crofter as from the first term of Whitsunday or Martinmas next succeeding the decision of the Crofters Commission, and shall come in place of the present rent, and, save by mutual agreement, the fixed rent shall not be altered for a period of seven years from such term.' Had there been nothing further in the Act, no difficulty

would have arisen, but the Act goes on to provide—sub-section 3, as amended by the Act of 1887—‘Where the Crofters Commission shall fix a rent which shall be less in amount than the present rent, the crofter shall be entitled, at the next payment of rent, to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of the notice of application to fix the fair rent and the first of Whitsunday or Martinmas next following the date when such rent was fixed.’ The pursuer contends that the present question is regulated by the first of these sub-sections alone, which clearly states that the rent payable at the first term after the Commissioners’ decision shall be the old rent. Sub-section 3, according to his view, applies solely to the case of a crofter who has continued to pay his old rent after the date of his application to the Commission, and cannot therefore apply here, for the defender admittedly has not done so. On the other hand, the defender argues that sub-section 3 applies to every case where the rent has been reduced—to the case of a crofter who, after the date of his application, has continued to pay his old rent, expressly—and to the case of a crofter who has not done so, but whose arrears have been partially cancelled, by implication. In other words, he contends that in every case where the rent is lowered the reduction is to draw back to the date of the notice of application to fix a fair rent. One of the objects of the Crofters Act of 1886 being to fix a statutory rent which should remain unchanged for a period of seven years, it was necessary to fix a date from which the seven years should run. For that purpose sub-section 2 of section 6 was obviously introduced, and it lays down a general rule in perfectly unambiguous terms, namely, that the last payment of the old rent shall take place at the term of Whitsunday or Martinmas following the Commissioners’ decision, and that from that term the fair rent shall commence to run. Such is the general rule, and I take it that without express words in the Act introducing an exception to that rule, it must be applied uniformly to every case, whether the rents are raised or lowered. The defender, of course, points to sub-section 3 as introducing an exception in his favour. But it is obvious on the face of that sub-section for what purpose it was introduced. The Crofter Commissioners are invested with very large powers to deal with arrears of rent under the statute; and there would, of course, be a very natural tendency on the part of those who had applied to the Commission, to allow their arrears to accumulate after the date of this application, in the hope that more would be struck off. To counteract this tendency, and to induce those to pay rent who could pay, by holding out this incentive that they should at least be in no worse position than their neighbours, was clearly the primary object of the sub-section. This object is attained by allowing the crofter to deduct all over-payments he may have made in excess of the fair rent since the date of his notice of application; in other words, the fair rent is made in effect to draw back to that date. As I read the statute, such is the inducement held out to

the crofter who continues to pay his rent, and it certainly forms an exception to the rule laid down in sub-section 2. But keeping in view the facts of the present case, is there any warrant in the statute for putting the defender in the same exceptional and favourable position? I cannot so read sub-section 3; on the contrary, it appears to me that a crofter who has not paid his rent, but has allowed it, as the defender has done, to fall in arrear, must come within the rule laid down in sub-section 2. The interpretation which the defender contends for would, I think, not only do violence to the words of sub-section 3, but would also have the effect of making that sub-section contradict sub-section 2—a result to be avoided, of course, if possible. If one attends to the way in which sub-section 3 is framed, it will be seen that nothing is said directly as to the fair rent drawing back. The operative part of the sub-section lies in the provision—‘the crofter shall be entitled to deduct,’ etc. That is to say, power is only given to deduct over-payments, and by that means the indirect result follows that the fair rent draws back to the date of application. Using the words of the sub-section in their natural and ordinary sense, they apply only to one case—the case of a crofter who has continued to pay the old rent, notwithstanding his application to the Commission, and I cannot see how they can be applied to a case like the present, where the crofter did not continue to pay the old rent, and where, therefore, not having made any over-payment, he could not claim any deduction. At best, the words of sub-section 3 could apply to the latter case by implication only. But surely the implication must give place to the clear and express terms of sub-section 2. It was argued for the defender that it was the intention of the Act to reduce rents that were found to be excessive, and to make the reduction take effect in all cases at the earliest opportunity after the Commissioners had given their decision. But the obvious answer is that the Act does not say so, although nothing would have been easier than to have introduced such a provision either in the original Act or when sub-section 3 came up for revision in 1887. The Act does, in a roundabout and indirect way, provide for the reduction, drawing back in the case of those crofters who have paid their original rents continuously up to the date of the decision. But it stops there; and in all other cases, as I read the statute, the rule applicable is that laid down by sub-section 2, namely, that after the first term of Whitsunday or Martinmas after the decision of the Commissioners the old rent shall be payable. From that date the new or statutory rent fixed shall commence to run, and shall not be altered for seven years. In this case, and in each of the other six cases regulated by the present decision, I therefore decern in favour of the pursuer for the full sum sued for.”

Ad. Robertson—All. Thomson.

All communications for the Editors to be addressed to the care of the publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE

Editorial.

The Auditor and Counsel's Fees.—In our article upon Extrajudicial Expenses in our January number, we cited, as an illustration of the glaring injustice of which the Auditor's department is the instrument, the matter of counsel's fees. We pointed out that the Auditor was never intended to be a sumptuary censor in this matter, and that it was his duty to allow not the fees which, with his most imperfect knowledge of the case, he may think ought to have been sent, but the fees which were actually sent to counsel, unless these were clearly extravagant; and we insisted that the agent was the best judge of the fees which it was necessary to send to counsel, and was not likely to be so reckless of his own client's interests as to send more than what was necessary. We are glad to observe that the views to which we gave expression have received a very emphatic and weighty indorsation from Lord Trayner. In a case disposed of the other day, the Auditor had cut down fees sent to counsel for an Inner House discussion from four and three to three and two. In sustaining an objection to the Auditor's report, Lord Trayner expressed his disapproval of the action of the Auditor in this matter in language as strong as could well have been used. He said:—"In my opinion it is not the Auditor's place to pare down counsel's fees. My own opinion, whatever may be the opinion of other judges, is that the agents who instruct counsel are in the first place the best persons to determine what is the proper fee to send

to counsel for the discussion they are being instructed for, because they know the difficulties of the case, and the amount of work and reading counsel have to go through, and they also know the value of the case. The Auditor does not know these things, and therefore I would not allow him to meddle with counsel's fees, so far as my own opinion is concerned, under any circumstances. It is quite right that any fee that is extravagant should be reported for the consideration of the Court. I think that the Court alone should interfere in the matter. In this case I feel strongly that the Auditor has gone wrong. Without any principle or rule to guide him, he has simply taken a guinea off each counsel's fee; I think that was mere cheese-paring, and accordingly I sustain the objection." This expression of opinion goes even beyond anything we have urged. But we again put the question: Where an unfounded action has been raised against A., and a responsible agent acting for him has sent to counsel the fees he thinks necessary, well knowing that there is a risk that his client may eventually have to pay his own expenses, why should A., on gaining his cause, not recover from B., the wrongdoer, the full expense thereby occasioned him; and is it a rational system which allows the discretion of A.'s agent to be overruled by the arbitrary opinion of an excellent old gentleman, who has only a fragmentary knowledge of the case, and who has not himself instructed counsel for twenty years?

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A Commination against Justices, Sheriffs, and Law Lords.
—Assonance is not the only connection between preaching and screeching now-a-days. One Sunday last month, a clergyman, whose name we do not remember to have heard before, held high revel in the preaching way. From different pulpits this person delivered the self-same sermon twice in one day—a fact which indicates that its author at least had a high opinion of the diatribe. It is a little to be regretted, perhaps, that the newspapers of the town should have given publicity to the frenzied outburst, even by way of fun, because there is a morbid class of mind which fails to distinguish between fame and unenviable notoriety. But we are glad to have had

an opportunity of reading so red-hot a piece of rhetoric; it is salubrious and refreshing in these flabby times. This temperate Christian first inveighed against the thousands who assembled on the Calton Hill the other day to catch a glimpse of a certain execution. A little ungrateful this, surely—for how could “sensational” preachers thrive, were it not for such cravings after unhealthy excitement? Then, if he was reported aright, this temperate Christian passed on to say: “Justice of a kind is the basis of the Court of Session. . . . Why is mercy so scant in the Court here? Because morality is not always on the Bench;”—nor in the pulpit, we may add. “The sinner has little or no mercy on the erring. If all the Justices, Sheriffs, and Law Lords had to undergo an examination in moral character, there would doubtless be several vacancies in Parliament House;”—and were a similar ordeal applied to clergymen, we may remark in passing, there would not be so many licensed students now waiting charges. This really terrible person, who would seem to thank God that he is not as this publican is, goes on to ask: “Are all the Sheriffs pure in heart and clean of hand? Some, I fancy, have seldom heard of the seventh commandment.” If this be so, then it is clear that these same Sheriffs have not been in the habit of attending a certain class of preacher, where all dirty details are dwelt on fully, and frequently and with manifest relish. There are eyes whose prurient search the sordid facts of the divorce courts, of seduction cases, of trials for rape, and the like, cannot escape, no matter how obscure the form in which respectable newspapers narrate them. These are only too often the eyes of clergymen, who wallow in the stuff throughout a sermon, or throughout the oratory of a “purity” meeting. To wind up his dread commination (which, by the way, came a little late for Ash-Wednesday), this stern moralist proceeded to slander the Lord Justice-Clerk in the most incontinent fashion, and to ostracise his Lordship socially, to remove him from the Bench, to excommunicate him, etc. etc., right away,—because he commented on an unusually high award of damages in a seduction case! Because he looked on a legal question as a legal question, and not one of sentimentality. In Scotland, happily, this kind of thing will do no harm.

Habitual Drunkards.—What shall we do with our curable inebriates? This question is receiving more than ordinary attention at present, in view of the proposals put forward in the Restorative Homes (Scotland) Bill. This measure embodies the conclusions come to by a large and influential portion of the medical profession, and by many others in Scotland interested in the subject. It provides for compulsory seclusion, in Homes established for the purpose, of those who cannot control their craving for drink and narcotics. Experience seems to teach that this is the only hopeful method of dealing with an unfortunate class of our fellow-mortals. In a country like ours, where the feeling in favour of the liberty of the subject is so intense, any proposal to deprive of that liberty a class of people who are neither criminals nor such as could be committed to a madhouse, is likely to meet with a good deal of opposition. We must for ourselves confess that our opinion is that liberty is only for those who can use it aright to make themselves respectable members of society, and, at least, inoffensive to their fellow-creatures. The Restorative Homes Bill proposes to relieve the community of persons who are a curse to it and to themselves, until they have become fit to associate with ordinary mankind; and we greet it as a well-directed effort to accomplish a desirable end.



Crofter Cases in the Sheriff Court.—The Crofters Act seems to bristle with knotty points. Last month we reported a decision of Sheriff Armour; this month we report one by Sheriff Blair. It is our misfortune to differ from both these learned judges. Section 6 (2) of the Act was under consideration in both cases. The terms of that portion of the section will be found on page 55. It will be observed that the section authorizes the tenant whose rent has been reduced, to deduct at next payment of rent from "the fixed rent" the amount of any overpayments since the date of the application to the Commission. In other words, the fair or fixed rent is to draw back to the date of the application. It will be observed, too, that the provision *assumes* that, where the rent is reduced, the rent for the term current when the fair

rent is fixed, is to be, not the old rent, but the fair rent. Now, Sheriff Armour has construed the section as a premium to honesty. Where up to the date of the decision of the Commission the crofter has paid the old rent, he is to get back the overpayment, and for the current term he is to pay only the fair rent; but where he fell into arrear, although the Commissioners may give him relief from the arrears, for the current term he must pay rent at the old rate, although that has been judicially declared to be too high. The question is a narrow one, and there is much to be said for Sheriff Armour's view. There would be more, however, if all crofters who failed to pay were dishonest. But the whole theory of the Act is, that in many cases there is inability to pay. If Sheriff Armour's view be sound, the most clamant cases are to be treated less favourably than others in which ability to pay has been demonstrated.

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WE have less difficulty about Sheriff Blair's decision. A crofter, whose rent is £8 per annum, is £13, 17s. 4d. in arrear when he applies to the Commissioners. Shortly afterwards he pays £9. That leaves £4, 17s. 4d. Another half-year's rent accrues, which makes the arrears mount again to £8, 17s. 4d. He pays £4 to account, which reduces the arrears again to £4, 17s. 4d. Another half-year's rent accrues, and again the arrears are £8, 17s. 4d. Here the Commissioners come in, reduce the rent to £3, 10s., and cancel the arrears. In these circumstances, Sheriff Blair reaches the somewhat surprising result, that for the current half-year no rent is due. He argues thus: Three half-years' rent at the new rate amount to only £5, 5s. But since he applied to the Commissioners, the crofter has paid £13! The conclusive answer to this is, that the test in terms of the Act is, not how much has been paid *since* the crofter applied to the Commission, but how much has he paid *in respect of* the intervening period; and in the present case nothing has been paid in respect of that period. The whole payments made during that period were applicable at common law to the arrears due when the application was made. But Sheriff Blair suggests another test. He adds the amount of

arrears cancelled to the amount of payments made. That makes a larger amount than the sum of arrears due when the application was made, *plus* rent at the new rate since that date. The fallacy of this test lies in this, that the arrears cancelled were arrears which had accrued at the old rate. The tenant cannot claim to be credited for two half-years' rent at the old rate as cancelled, and at the same time to be debited with these two half-years' rent only at the reduced rate. If the fair rent is to be held as drawing back to the date of the crofter's application, the Commissioners cancelled not £8, 17s. 4d., but only £4, 7s. 4d. of arrears. Applying Sheriff Blair's test on this the only fair footing, we find £1, 15s., or exactly the amount of the fair rent due for the current half-year.

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Severe v. Lenient Sentences.—The Recorder of Liverpool, in referring recently to some adverse comments which had been made upon the shortness of his sentences, expressed the belief that the shutting up of offenders for long periods, and their exclusion from the world and from such slight enjoyment of life as their lot may bring, merely takes the small remnant of good out of the wretched subjects of such treatment. If justice be out of proportion severe, he said, it is cruelty. If it be cruel, it sets a bad example to criminals. There is much force in these remarks. No doubt the standpoint from which they are made is too exclusively that of the reform of the criminal himself, and too little that of the protection of society through the more direct means of deterring others from committing the like crimes, and of putting certain pests out of the way for a time. But in regard to very many cases, the Recorder's remarks are not only humane, but recommend the more enlightened and hopeful practice. The matter, as all concerned in the administering the law insist, is not to be decided by hard and fast rules. Each case is to be looked at in itself. It is because judges do this conscientiously, and in the light of facts of which irresponsible and reckless critics have no knowledge, that we hear so much about "unequal" sentences, "smart" sentences, and "lenient" sentences.

Solicitors struck off the Rolls.—Nobody who reads the English law journals, or even the daily papers which chronicle legal matters, can fail to be struck by the number of cases in which, within the last few months, solicitors have been struck off the rolls for flagrant dishonesty. Even if all allowance be made for the much larger numbers of the body of practitioners in England, the cases of the kind would seem to be much more frequent than in Scotland. We do not know, however, that we are entitled to claim credit for greater purity than our neighbours. The truth is, that the Scottish lawyer who has got into hopeless embarrassment, generally bolts or dies. The English one seems to stay and survive, and so he is struck off the rolls or suspended from practice for a time. To take Edinburgh, for example, on a rough calculation, over the last dozen years, the rate of bolting is about one *per annum*, and there are about an equal number of cases in which death discloses a woful tale of insolvency and speculation. This is not perhaps a very large percentage, but it is quite enough to restrain us from reproaching our southern brethren.

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Notarial Execution.—In the case of *Lang v. Latta*, decided by the First Division upon 15th March, a question was raised which is of some importance to notaries, viz. Whether the notary employed by one party to a contract to prepare a deed, can execute it notarially for the other? In the case in point the deed was a contract of marriage. Lord Lee held that the notarial execution was invalid, and reduced the deed. On a reclaiming note, the First Division treated the question as to notarial execution as a doubtful one, but they recalled the Lord Ordinary's interlocutor, and assoilzied the defenders, on the ground that the contract, if invalidly executed, was validated by the *rei interventus* implied in the marriage following upon it, a doctrine which rests upon an authority so hoary as the case of *Nisbet v. Newlands*, 1630, M. 17016, 5682. The question in regard to the notarial execution was expressly reserved, and may therefore be regarded as an open one. But, in the face of the decision, it would manifestly be prudent to procure an independent notary to subscribe for an illiterate in

every case where the agent of the other party has prepared the deed. There can be no doubt that this precaution is not in accordance with the practice of the profession. An illiterate has seldom any agent, and there must have been hundreds of cases, especially in the seventeenth and eighteenth centuries, when female education was not so well attended to as now, where the contract was prepared by the husband's agent on his instructions, and executed by this agent and another notary on behalf of the wife. But the objection appears never to have been taken. Again, the institutional writers most carefully examine the different disqualifications of a notary, but in none of them is there any hint that agency for the one party disqualifies the notary to subscribe for the other. These disqualifications, too, have been canvassed in a number of cases. It has been decided that a notary cannot act both as procurator and notary; that he cannot take infestment on a notarial instrument prepared by himself; that he cannot protest his own bill; that he cannot execute a deed under which he takes benefit. It has been doubted whether the same notary can subscribe for both parties to a contract (Cf. *Craig v. Richardson*, 1610, M. 16829, with *Graeme v. Graeme*, 1868, 7 Macph. 14). But until the case of *Lang*, it seems never to have been suggested that agency for the one party to a contract constituted disqualification to subscribe for the others. There seems much to be said, however, in favour of the view that this ought to be held a disqualification, and perhaps the result of the case of *Lang* is not unfortunate, in so far as it puts practitioners on their guard for the future, without, for the first time, enforcing a disqualification which had never been supposed to exist.

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The Lord Justice-Clerk on Oratory.—When presiding at the annual dinner of the Scots Law Debating Society of Edinburgh University, on the 15th of last month, the Lord Justice-Clerk made some interesting remarks on the value and character of oratory at the present time. To-day, his Lordship considers, "mere oratory is of very little influence." Nevertheless, although he thus believes the market value to be little, and the demand for the commodity small, he yet

considers the supply excessive. This is an anomaly which would seem to upset the maxims of political economy, and to require explanation. His Lordship commented on the tendency of modern speaking to run into extreme. "The tendency of our time is more and more to trust to violence and exaggeration, which may influence a man's mind for the moment, but has no influence upon society or upon our minds but the influence of evil." It might, perhaps, be asked in what respect this tendency to study present effect differs from the aim of oratory at any period of its history; or what object, for example, the counsel for a prisoner ought to have in view other than to "influence a man's mind for the moment," and so to seize his very momentary opportunity of snatching his client from the gallows? What will it avail him or the prisoner, that his speech has had a lasting influence for good upon society and men's minds in the long run, if the wretched client has been hanged through his not having influenced men's minds for the moment? Exaggeration undoubtedly is largely resorted to by every class of orator. Heightening colour and unduly emphasizing points have always been the methods of those who sought to move and persuade men. It may even be the case that in the political world there is a greater exuberance of this now than formerly. But surely, of all classes of speakers, that of which his Lordship was addressing the coming generation is the least addicted to exaggeration and high-colouring. However prone by nature a pleader may be to give indulgence to a lively imagination, a Gradgrind-like love of facts prevails on the Bench, and he will speedily be brought back to a humdrum statement. Serjeant Buzfuz's famous address in *Bardell v. Pickwick*, with its touching description of the late Mr. Bardell's death, would have been impossible in Scotland. The chilling sneer on the Bench would have checked the learned Serjeant's eloquence at every turn.

Special Articles.

PRISONERS' DECLARATIONS.

It has always been a recognised rule of the criminal law of Scotland, that an accused person cannot give evidence in his own trial; and so fixed is this rule, that if the prosecutor calls a *particeps criminis* as a witness, such witness is entitled to free pardon, however serious the crime is and however intimate his participation in it. This rule of law has been relaxed by the Criminal Law Amendment Act, 1885 (48 and 49 Vict. chap. 69, sec. 20), to the effect that, in prosecutions founded on that Act, the accused is a competent but not a compellable witness. If the accused should tender himself as a witness, he of course subjects himself to the liability of being cross-examined. But while an accused person in most cases cannot give evidence in his own trial, and, in the limited class of cases above referred to, is entitled, but not bound, to give evidence, there has existed from a very early time what is known in our law as the judicial examination of accused persons. This examination of the accused is conducted before a magistrate immediately after the apprehension, and it is the duty of the magistrate conducting such examination to warn the accused that what he says may be used in evidence against him, and that he may decline to answer questions put to him. What the accused says ought to be free and voluntary, and not induced or elicited by promises or threats. These safeguards to this system of judicial examination have always been regarded as established in our criminal law, but it is doubtful how far they have been observed. At any rate, it was recently deemed necessary to enact that, "where any person has been arrested on any criminal charge, such person shall be entitled, immediately upon such arrest, to have intimation sent to any properly qualified law-agent that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination; and such law-agent shall be entitled to have a private interview with the person accused, before he is exam-

ined on declaration, and to be present at such examination, which shall be conducted according to the existing practice" (Criminal Procedure Scotland Act, 1887, 50 and 51 Vict. chap. 35, sec. 17). It is doubtful how far Mr. N. D. Macdonald's commentary on this provision (Manual, p. 6), to the effect that "the legal adviser may be present at the examination, but cannot interfere in the proceedings, as they are to be conducted according to the existing practice," is correct. An examination conducted according to the existing practice at the date of the passing of the statute, was conducted in the absence of the legal adviser; and a more rational view, and one, it is contended, more in accordance with legal notions, is that the legal adviser is to be present for the purpose not only of advising the accused, but for the purpose of objecting to any irregularity in the proceedings. It might even be a good answer to an objection taken to a declaration at the trial, that the objection was not taken by the panel's agent at the time when the declaration was emitted. But the declaration, being once emitted, becomes a material article of evidence against the prisoner. The declaration, however, is not taken with the view of being used as evidence for the prisoner. He cannot lay it before the jury unless the Crown consents; unless, indeed, the Crown puts it in evidence as part of the case for the prosecution (*M^{rs} Queen v. Robson*, 1832, not reported, noted in 2 Alison, p. 577). In the case of *Elizabeth Kennedy or Potts* (Glasgow, 27th December 1842, 1 Brown, p. 497), and again in the case of *Margaret Wright* at the same Circuit, it was held that a panel is not entitled to give the declaration in evidence, even to the effect of showing that a consistent story has been told. In Bell's Notes to Hume (p. 285) these cases are referred to, and the remark is added, that "it is a very usual thing for the prosecutor to ask whether the panel wish the declaration read, and if he do, to read it in the course of his own evidence."

Alison (2, p. 555) thus states the *rationale* of the law of prisoners' declarations, though, as it will be pointed out, his statement is not quite in accordance with existing law:—

"The principle of law, and the rule of common sense, is, that every deed done, and every word spoken by the prisoner, subsequent to the date of the crime charged against him, is

fit subject for the consideration of the jury, and that, if duly proved, it must enter into the composition of their verdict. Of course, among the circumstances which may be of weight, either for him or against him, none can be more material than what he deliberately said himself, when brought before the magistrate for examination. If the story then told is probable in itself, and agrees with what the witnesses have proved, in those particulars in which it is susceptible of confirmation, it is as material a circumstance in his favour as, if it is absurd or incredible, and contradicted by their testimony, it is a circumstance of weight against him."

There is no doubt that statements made by a party to a civil action, or by an accused person against his own interest, may be proved, and are competent evidence. They are admissions; and these, when relevant, may always be proved. But it is equally settled law, that evidence of a party's or of a prisoner's statements in his own favour is inadmissible, because such statements are likely to be biassed and untrustworthy (*Hunter v. Dodds*, 12th July 1832, 10 S. 833). The only exception to this is where the declaration of a prisoner contains statements in his own favour, and these, by the grace of the prosecutor, are put in evidence for the Crown. The common-sense which Alison thus speaks of, in accordance with which every word spoken by a prisoner subsequent to the crime is made fit subject for the consideration of the jury, is not yet imported into law.

It has been laid down that a declaration can be used against a panel even when he refuses to answer. Macdonald (second edition, p. 259) says that "if the prisoner verbally refuses to answer, his refusal is taken down, and forms a valid declaration." This, however, is unsupported by authority, and it is doubtful, if objection were taken to such a declaration, whether it would not be rejected as not being evidence of the crime, and as tending unduly to prejudice the minds of the jury. It certainly is the practice to read such declarations, and it is also the practice to read declarations which the prosecutor knows to be a tissue of lies, and he reads them just on that account. It certainly has never been decided whether such declarations are competent evidence at all, and it is doubtful whether a declaration which does not contain

some evidence of the crime charged would, if it were made clear that it did not, be allowed to be put in evidence at all. Suppose, for example, a prisoner were to emit a declaration in which he set up an *alibi*, and stated that he had no connection whatever with the crime. Surely that of itself, however false, is no evidence that the prisoner committed the crime charged. If, however, he state something in his declaration which would be relevant and competent evidence if sworn to by a witness,—if, for example, he were to admit being at the place where the crime was committed at the time libelled,—then it is granted that the declaration would, to that extent, be competent and proper evidence. But if the prisoner refuse to answer questions, or if he declare that he did not commit the crime, or even if he tell a series of the most undoubted lies, or at any rate make a number of statements which are inconsistent with his commission of the crime, or the case for the prosecution—is a declaration in any of these circumstances any evidence of the crime and the prisoner's guilt? The prisoner may be the greatest liar born, or the most ingenious knave, but that is no reason why he should be hanged for murder or sent to prison or penal servitude for robbery. Surely, in a country the boast of whose criminal system is that a prisoner should have the benefit of every doubt, there is need for reform in a branch of its legal procedure which allows things to be done for no other purpose than that of prejudicing an accused person in the eyes of the jury that is to try him.

It would, of course, always be the duty of the Court to determine how far, if at all, a prisoner's declaration is competent evidence.

The law of prisoners' judicial declarations in England is different from the law of Scotland in this respect. It is regulated by the statute 11 and 12 Vict. chap. 42, which enacts (sec. 18):—

“And be it enacted that, after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the Justice of the Peace, or one of the Justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the

accused, the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.' "

The magistrate then gives a further caution, that the accused has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to induce him to make any confession or admission of his guilt.

It will be observed that the declaration is emitted, not immediately after the prisoner's apprehension, but after the depositions of the witnesses have been taken and duly read over to him. He is, moreover, not examined—or rather cross-examined—in answer to the charge, but simply allowed to make a statement or to refrain from doing so, in either case voluntarily. Indeed, it has been held that a confession by an accused person is inadmissible in evidence, if it be the result of questions put to the prisoner, whether by the police or by the prosecutor in the presence of the police. In the recent case of *R. v. Gavin* (15 Cox. 656, 28th April 1885), Smith, J., said:—

"When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over to him, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once in charge, and he ought not to be asked anything. A constable has no more right to ask a question than a judge to cross-examine, for it is practically a cross-examination; nor can he say, '— said that; what do you say to it?' for that is in the nature of a cross-examination. Before the prisoner is charged or is in custody, he may be asked what he has to say or in answer to the charge."

The grounds upon which the law of England rests in this matter of prisoners' declarations are more equitable in many ways than those of the law of Scotland; and the conclusions that are arrived at are—that if the judicial examination of accused persons is to remain a part of our criminal procedure, it ought to be made more in accordance with the system

observed in England, and in any event it ought to be in the power of an accused person to call for, and put in evidence for his own defence, any declaration which he has emitted in the presence of a magistrate, and which may, in the option of the Crown, be used against him.

ASSUMPTION OF EXECUTORS.

MR. CURRIE, in his book on Confirmation of Executors (p. 41), states that the practice in the Sheriff Court, Edinburgh, is to interpret the Trust Acts, 1861 and 1867, as authorizing the assumption of executors.

Mr. Currie cites a case wherein Lord Ordinary (Gifford) appointed trustees under a settlement, with the usual powers; but there does not appear to be any reported decision by the Supreme Court authorizing the assumption of executors.

It is enacted by the 18th section of the Trust Act, 1867, that "where a trust deed appoints the trustees to be also executors, the resignation of a trustee shall infer his resignation also as an executor." The above section of the Act clearly states that the office of executor is to be resigned merely by *inference*. Such being the case, can it be also held that the converse rule applies, and that when a trustee assumes a new trustee such assumption shall also infer the assumption of an executor? Had it been specially enacted that the assumption of a trustee was to infer the assumption of an executor, no question about their assumption under the Act could exist; but, without some specific direction thereanent, the answer must be in the negative.

Where a testamentary writing contains express powers to assume new executors, there can be no question about the right to assume; and where, also, a trust settlement gives special power to assume trustees, without referring to executors, the practice is to recognise that such power implies power to assume executors.

While the terms trustee and executor often mean the same thing, still they are not at all synonymous in law. M'Laren on Wills (vol. 2, p. 142) points out the peculiar meaning and

import attached to the term executor. The word has no equivalent in the legal language of Scotland.

The mere nomination of an executor without additional words of any kind, is of itself equivalent to a special conveyance of the whole executry estate for division, and is a warrant for expeding testament testamentar; but the converse does not hold where a person is merely appointed to be trustee. The mere appointment of a trustee without specific powers and duties expressed is inept, and of no effect in law for any purpose whatever. And where a testamentary writing gives power to ingather and administer executry estate, although the writing contains no special conveyance and no nomination of an executor, the omission is not an indispensable *vox signata* to obtaining a title as executor nominate (A. M. Bell's Lectures, p. 865). The office of executor nominate often carries with it trust duties as onerous and responsible as that of a testamentary trustee, and that particularly where portions of the executry estate are to be held for liferenters or for minors.

Where there are several trustees and executors in a deed, it sometimes happens that only one of the number accepts office, and that merely for the purpose of assuming others to represent the trust, when he immediately thereupon resigns the whole trust; and it is in such a case, when confirmation is wanted, and there happens to be no express or implied power in the testamentary settlement to assume trustees or executors, that we are called upon to consider and determine by what authority executors can be assumed. There is no direct authority from any reported decision in the Supreme Court for holding that executors can be assumed under the Trust Acts, and the Acts themselves are silent on the subject.

Where the testator's own *delectus personæ* fails to act as executor, it might be maintained that it would be more equitable for the beneficiaries, or heirs *in mobilibus*, to make up titles in their own names as executors at common law, and thereby exclude from the administration assumed persons, who might be strangers and inimical.

M'Laren on Trusts (vol. i. p. 240) states that assumed trustees have not the powers of executors; and in his excellent authority on Wills (vol. ii. p. 192) he states that "a power to

assume new trustees does not entitle the assumed trustees to exercise the office of executor; and accordingly the Commissary Courts do not grant compensation in favour of assumed trustees." In the case of *Urquhart v. Dewar*, 13th June 1879 (6 R. 1026), the Lord President says "that an executor has no power of assuming other executors as a trustee has;" and Lord Shand also therein says that "an executor nominate cannot assume other executors."

It is decided in *Ainslie v. Ainslie*, 8th Dec. 1886, (14 R. 209), where the executors nominate are directed to hold the estate for liferent uses, etc., and a trusteeship thereby imported, that executors nominate in such a case have the power of assumption of new trustees under the Trust Act, 1861, where their duties really amount to a trusteeship. But it does not follow from the above decision that executors can be assumed, or that assumed trustees can be confirmed as executors under a testament testamentar. The judges in this case are silent on the subject of assumption of executors.

The Trust Act of 1871 merely authorizes executors nominate to invest funds under the Acts 1867, and does not help the question at issue.

In the Sheriff Court of Lanarkshire, in the case of *Kennedy's Trustees*, 28th March 1877, where a sole trustee and executor in a deed of settlement assumed new trustees under the Trust Act 1861, and then resigned, and the assumed trustees applied for confirmation as executors, the Sheriff-Substitute (W. C. Spens) held that "statutory provisions must be construed strictly, and trustees cannot be regarded as executors unless some section of the Trust Acts confer the power; and the assumption of trustees under the Act does not make them also executors."

The Trust Acts are differently interpreted by Sheriffs in different counties, and this may continue until more light is obtained, or a new direct authoritative decision by the Court of Session is pronounced on the subject.

Had the Legislature introduced the term "executors nominate" into the Trust Act of 1861, authorizing the assumption of executors when there was a trust deed, a good purpose would have been served, and doubt and difficulty removed. It is understood, however, that a strong representation was made

to the Lord Advocate when the Trust Act was framed anent the propriety of extending the Act to include executors nominate, but his Lordship would not yield the point. As there exists no power at common law, or special power under statute, or any direct authorities under any decision of the Supreme Court, authorizing the assumption of executors, and as the practice in Edinburgh Sheriff Court seems to be founded merely on the opinion of the local Sheriff, the assumption of executors without express or implied powers in a testament remains a doubtful proceeding.

The judges of the Supreme Court, in their expressed opinions, stick to the text of the legal questions at issue, and do not, as a rule, offer general or extraneous opinions on collateral points of law not submitted for decision, so that every case has its own special features and stands by itself, and outside thereof, and where there is no express data, all equitable interpretations of statutes by the people are mere speculations.

W.

*THE DECISIONS ON THE CONVEYANCING
(SCOTLAND) ACT, 1874.*

III.

IN our second paper we traced the decisions on this Act, the results of which have been to modify the rights and liabilities of superiors and vassals, and we may define the results to be—(1) The nominal mid-superiority which formerly remained in the person of the granter of a Disposition with an *a me vel de me* holding is evacuated by the registration of his disponee's title in the Register of Sasines; so that the means which, through the existence of such an estate of mid-superiority, a vassal formerly had of defeating his superior's claim to a casualty, no longer exist; (2) that the date of the death of the last-entered vassal—i.e. of a vassal who has either been entered by Writ with the superior, or, having been entered by force of the Act, has paid a casualty or other fine—has now become the due date of the casualty payable by his successor, and in estimating such casualty the rent of the year in which the death happened is to be taken; and (3)

that not only is that so as between superiors and vassals, but the rule also holds good in questions between successive proprietors of the *dominium utile*, so that the clause of relief from casualties contained in a Disposition in ordinary form, entitles the disponent to relief, at the hands of his disponent, from the burden of a casualty, which had previously become exigible, but which has only been claimed after the date of such entry.

While these are points on which it has been held that the Act, by its operation rather than by any express provision, has altered the law as it previously existed, certain of the other decisions add considerably to our stock of judicially defined principles regulating the rights and liabilities of superiors and vassals. Thus we have it decided that a vassal who is proprietor of a subject which is only part of an original feu, is entitled to redeem the casualties applicable to that part alone; that in ascertaining the casualty due to a superior, the rent or returns from minerals which are being worked from the lands must be taken into account; while in certain of the other cases which follow the case of *Allan's Trustees*, we have the rules laid down for ascertaining not only how the rent or return from minerals, but also how the annual mail of certain other subjects, such as a public hospital or part of a railway, falls to be estimated in different circumstances; that trade fixtures are not to be assessed in fixing a casualty, but that shootings, although unlet, are; that where subjects are held under a Contract of Ground Annual, the ground annual payable by the vassal is no criterion of the casualty due by him to his superior; that in certain circumstances a casualty is a *debitum fundi*; and that a provision in a Feu-Contract dated prior to 1874, for a duplication at stated intervals of the feu-duty, is a Discharge of the casualties of superiority.

We now pass to the consideration of the decisions on certain of the other sections of the Act; and happily the results of these decisions can be, in most cases, stated without any very lengthened notice of the circumstances out of which they arose.

The first case calling for notice is that of *Douglas v. McWilliam & McCutcheon*, 8th March 1876. The 25th section of the Act abolishes the distinction between feu and burgage holdings; and with reference to that part of the section which

authorizes the proprietor of a property held burgage to grant feus, and declares that "the titles of all such feus granted before the commencement of the Act shall be unchallengeable, on the ground that such feus were of lands held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines," it was here decided (by Lord Curriehill and acquiesced in) that the title to a feu of lands originally held burgage, and granted before the Act came into operation, was validly recorded in the Burgh Register of Sasines.

The provisions of section 34, to the effect that "any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines, shall be a sufficient foundation for prescription," was held in *Hinton and others v. Connell's Trustees*, 6th July 1883 (First Division), not to include a Decree of Adjudication for debt, duly recorded in the Register of Sasines and followed by a Decree of the Expiry of the Legal, because a title of that description was not an *ex facie* irredeemable title, but only one in security for a debt.

The decisions on the 38th and 39th sections of the Act would, if we followed the proper order, fall to be noted here, but it will be more convenient first to dispose of the other sections on which the decisions are less numerous.

In *Atchison's Trustees v. Atchison*, 21st January 1876, the First Division (affirming Lord Young) decided, that the 41st section of the Act rendered valid a docquet by a notary-public, which set forth all the particulars required by the section, although it was not in the form of the schedule attached to the Act. The docquet in this case contained a statement of all the particulars required by the schedule, viz. the granter's authority to the notary; a record of the declaration by the granter that he could not write, and the cause of the inability; and the subscription by the notary after the deed had been read over to the granter, all in presence of the witnesses who attested the facts by their subscriptions; but these particulars were not stated either in the order they occur in the schedule, or in the words therein used. The Court held that such a divergence did not invalidate the docquet.

In *Watson v. Torrance and others*, 24th October 1883, the notary's docquet was conform to the schedule except in the important point that the words "gone over and explained to

him" were substituted in the docquet for the words "read over to him" given in the schedule. The parties upholding the deed averred and offered to prove that the deed had been read over by the notary to the granter twice before subscription—the first time *verbatim* from the draft, and the second time, if not *verbatim*, at all events substantially, from the engrossment, no material word being omitted. The Lord Ordinary (Lord Adam), on the ground that the "reading" over of the deed is an essential preliminary in the solemnity of notarial execution, reduced the deed; but on appeal, the Court (Second Division) recalled the interlocutor of the Lord Ordinary, and, "before answer, allowed parties a proof of their respective averments." The sequel of this case is not reported.

The 47th section dispenses with the necessity for Bonds of Corroboration in certain cases; and was the subject of judicial interpretation in three instances. The leading provision of the section is, that a heritable security, duly constituted on an estate in land, shall, together with the personal obligations in it, "transmit" against the person taking such estate, "when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden," etc. As to what is not *in gremio* of a deed, we may note the case of *Smiths v. Chambers' Trustees*, 9th November 1877 (affirmed, House of Lords, 15th April 1878), in which a restriction contained in the testing clause of a Trust-Disposition and Settlement, to the effect that the legacies and other provisions contained in the deed were alimentary and not attachable for debt, was found to be inoperative. The opinions of the judges (First Division) contain a review of the functions of the testing clause. On appeal, the Judgment was affirmed by the House of Lords, diss. Lord Gordon, who was of opinion that it was a departure from the principle laid down in *Dunlop v. Greenlees* (H. of L.), 2nd June 1865, where an acceptance by a wife of testamentary provisions was sustained, although she was only made a party to the deed in its testing clause, by the introduction of these words, "And by me, the said . . ., in token of my consent to and approval of the foregoing settlement."

In *Carrick and others v. Rodger, Wall, & Paul*, 3rd December 1881, and *Dullatur Fewing and Building Company v. Ritchie & Sturrock*, 16th December 1881, the question was whether the

words employed in *gremio* of the Conveyance were sufficient to constitute an Agreement that the Bond and Disposition in Security was to transmit against the disponee. In *Carrick's* case the consideration was stated to be £1000 paid by the purchaser, "and in consideration of their freeing and relieving me (the seller), as by acceptance hereof they bind themselves to free and relieve me, of payment of the sum of £6400, contained in certain Bonds and Dispositions in security granted by me over the said subjects, said sums amounting in *cumulo* to the sum of £7400, being the agreed on price of said subjects." The Court (Second Division, rev. Lord Fraser and diss. Lord Craighill) construed the clause quoted as one of relief as between the seller and purchasers, and held that it did not constitute an Agreement that the heritable debt should in a question with the creditor transmit against the purchasers, which it was necessary it should be, if the section was to apply. In the *Dullatur Fencing Company's* case, the property was conveyed "under burden of the sum of £6800, being the amount of several heritable securities existing over the said subjects," and, as was to be expected after *Carrick's* case, the Court (Second Division), on appeal from the Sheriff of Lanarkshire, affirmed the Sheriff's Judgment that these words were not effectual to transmit the personal obligation for the sums in the Bonds against the disponee of the property. In the important case of *The University of Glasgow v. Yuill's Trustees*, 10th February 1882,—which is better known as affirming the principle that a creditor, in ranking on the sequestrated estate of his debtor, is not bound to value a security held by him over property which does not belong to the bankrupt, before drawing a dividend,—a question arose as to the effect on the rights of the creditor where the obligations of the Bond had been effectually transmitted. It was contended that the effect of the "transmission" was to place the burden of the debt entirely upon the shoulders of the purchasers, to the relief, even in a question with the creditor, of the original debtor. The Court (First Division), without calling for argument from the creditor, negatived that view. Lord Shand remarked, "I am quite clearly of opinion, that the sole effect of the transaction was to put the party receiving the property substantially in the position of having granted a Bond

of Corroboration without relieving the original debtor of his obligations."

The 55th section of the Act repealed the 118th section of the Bankruptcy (Scotland) Act of 1856. Before the passing of the Bankruptcy Act of 1839,—of which, in so far as the rights of creditors holding heritable securities over the estates of the bankrupt debtors are concerned, the Act of 1856 was practically a re-enactment,—a creditor holding such a security could by an Action of Poining of the Ground, and even in a question with a trustee on the sequestrated estate of his debtor, operate payment of the heritable debt, principal as well as interest, out of the moveables belonging to the debtor and situated on the subjects covered by the security (*Campbell's Trustees v. Paul*, 13th January 1855, 13 S. 237). He had similar rights over the rents of the subjects, if they were not in the natural possession of the debtor. But the Bankruptcy Act restricted these rights in a question with a trustee in bankruptcy. The 118th section of the 1856 Act provided, that "no Poining of the Ground which has not been carried into execution by sale of the effects sixty days before the date of sequestration, and no Decree of Mails and Duties on which a charge has not been given sixty days before said date, shall (except to the extent hereinafter provided) be available in any question with the trustee; provided that no heritable creditor who holds a security over the heritable estate, preferable to the right of the trustee, shall be prevented from executing a Poining of the Ground, or of obtaining a Decree of Mails and Duties *after* the sequestration; but such Poining or Decree shall in competition with the trustee be available for the interest only on the debts for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term." That enactment was, as we have said, repealed by the 55th section of the Conveyancing Act of 1874; and in the case of *Royal Bank of Scotland v. Bain (Brown's Trustee)*, 6th July 1877, the Court (First Division) held that such repeal had the effect of restoring to creditors their old common law rights, and that an heritable creditor who had executed a Summons of Poining of the Ground after the date of his debtor's sequestration, but before the date of the trustee's confirmation, had,

in a question with the trustee, acquired a preferable right to the moveables on the ground forming the subject of the heritable security. In *Dick's Trustees v. Whyte's Trustees*, 28th January 1879, the rights of an heritable creditor were carried a step further. Here it was held that the right of an heritable creditor who had executed a Poinding of the Ground only after the date of the trustee's confirmation, but before the moveables had been removed from the ground, was preferable to the right of the trustee. After these decisions, the provisions of the 118th section of the Bankruptcy Act of 1856 were expressly re-enacted by the Conveyancing (Scotland) Act Amendment Act, 1879, and in that state of the law the case of *Millar's Trustee v. Horsburgh (Miller & Son's Trustee)*, 4th February 1886, arose. Here the testamentary trustees of a person who was proprietor of the property in which he carried on business, and over which he had granted a Bond and Disposition in security, made over the property, under burden of the Bond, together with the whole business assets of the truster, to certain members of the truster's family, who afterwards became bankrupt. The creditor in the Bond and Disposition in security thereupon executed a Poinding of the Ground, which, in a question with the trustee in the sequestration, was sustained, for reasons which will be found fully stated in the opinion of Lord Kinnear, whose judgment was affirmed by the First Division. The reasons were, stated shortly, that the trustee in bankruptcy took the estates, heritable and moveable, of the bankrupts under all the burdens which affected them; that the security granted by the author of the bankrupts in favour of the heritable creditor was not prejudiced by the transfer to the trustee; that the holder of that security being the creditor, not of the bankrupts but of the bankrupts' ancestors, did not come within the class whose rights were limited under the 118th section of the Act of 1856 as re-enacted by the Act of 1879, and that therefore the Poinding was effectual. This decision was in its turn followed by the Amendment Act of 1887 (*supra*), the 2nd section of which makes the limitations introduced by the previous legislation applicable to poindings of the ground at the instance of an heritable creditor, whether of the bankrupt or of the bankrupt's ancestor. The result is that in question with a trustee in bankruptcy, the rights of an herit-

able creditor pointing the ground are placed on the footing on which they originally stood, under the 118th section of the Act of 1856, as explained by the 2nd section of the Act of 1887.

We now turn to decisions on the 38th section (which alters the rules as to probative deeds) and on the 39th section (which provides that deeds which are improbative, if certain facts can be proved, are not to be invalid); and we will take the decisions on these two sections together.

That these sections are not retrospective, was decided in *Gardner v. Beresford's Trustees*, 8th February 1878 (affirmed, House of Lords, 21st March 1878).

The first case in which the machinery provided by the Act for enabling the holder of a deed *ex facie* improbative to set it up, was brought into operation, is that of *Addison and others*, 23rd February 1875. This case is important not only as being the first application to the Court under the 39th section, but as showing the limit to which such an application for a Judgment of the Court must be confined. The deed with which the Court had to deal in this case was a Trust-Disposition and Settlement. It was believed to have been signed between 1st September 1871 and 30th April 1873, but the truster did not die until the 31st December 1874. The fact that the deed was executed before the passing of the Act was not referred to in the petition, nor is the fact that the prayer of the petition was granted in this case referred to in *Gardner's* case as an authority for or against the retrospective operation of the Act. Probably the explanation is, that by the Entail Amendment Act of 1868 (section 17) it is declared, that "the date of any testamentary or *mortis causa* deed shall"—it does not say for the purposes of that Act, or of that special section of it—"be taken to be the date of the death of the granter." The Trust-Disposition and Settlement in *Addison's* case, which bore to convey the truster's whole means and estate to certain trustees, was found in the repositories of the deceased. It was not holograph, but it was signed by the truster and witnessed by two witnesses, who were known and could be produced. In the clause naming the trustees, and in certain other parts of the deed where the trustees' names were repeated, certain alterations had been made by the truster in

his own handwriting, with the apparent intention of substituting certain other trustees for those whom he had originally named. The testing clause was not filled up; and, as it turned out, it was impossible to get that done. In these circumstances the widow and children of the truster presented a Petition to the Court under section 39 of the Act, in which, after setting forth the facts, they asked for a proof of their averments, and prayed the Court to find that the deed was subscribed by the granter and the witnesses by whom it bore to be attested, and "that the said Trust-Disposition and Settlement is a valid deed, and is entitled to effect according to its legal import." The Court (First Division) ordered the words which we have quoted to be struck out of the prayer of the petition, and, after hearing counsel on the impossibility of getting the testing clause filled up, they found and declared as craved.

The case of *Veasy v. Malcolm's Trustees*, 2nd June 1875, illustrates what takes place where the testing clause can be filled up. Here the testing clause of a Codicil was filled up after the testator's death, and it being admitted that the facts set forth in the testing were true, and that the testing clause was added before the deed was produced and founded on in Court, the Court (Second Division) held that the Codicil was a duly tested deed.

In *Veasy's* case the testing clause was filled up before the deed was founded on in Court. But in the case of *Millar v. Birrell*, 8th November 1876, the Deed—a Mutual Disposition and Settlement—was produced in a Process before the Sheriff Court with the testing clause blank, and the Sheriff decided that as it had no testing clause, it was of no effect, and that, having been produced in Court, it could not thereafter be completed. On appeal, the Court of Session (Second Division), reserving all questions of the competency or the effect of such a step, allowed the testing clause to be filled up. The question thereafter resolved itself into one as to whether the deed had, in the sense of the Act, been "produced in judgment." Lord Gifford, who delivered the leading judgment of the Court on the branch of the case dealing with the competency of filling up the testing clause, says, "The deed was not produced by the trustee, or by any party founding or claiming thereon,

or having any interests to claim thereon as a completed deed. It was not produced by any beneficiary under the deed, or by a legatee or party favoured thereby." It was, on the contrary, produced by a party who impugned its validity, and the Court held that production of the Deed in these circumstances "formed no bar to the testing clause being thereafter filled up in common form;" and "that the general rule, that a testing clause, which is always, or almost always, filled up after execution, may be filled up at any time before the deed is founded on in judgment," applied.

The case of *Thomson's Trustees v. Easson*, 2nd November 1878, illustrates the circumstances under which, where, through the Deed having been produced in judgment and the remedies provided by the 38th section having thereby become impossible of adoption, the course of procedure introduced by the 39th section may be followed. In this case David Thomson left a holograph Will, with a later addition and a Codicil, which was written by a third party and signed by the testator and by two witnesses, but was without date or testing clause. The deeds were recorded in the Commissary Court Books as they stood, and they were also founded on in Court in various actions against certain of the testator's debtors. Thereafter the trustees named in the will presented a Petition under section 39, asking to be allowed to prove the date of the Codicil, the name of the writer, and the genuineness of the subscriptions, and praying the Court to declare that the Codicil had been subscribed by the granter and by the witnesses by whom it bore to be attested. To this it was objected that section 38, and not 39, was the section applicable to the state of the facts; and that, as the petitioners had not adopted the proper remedy in time, the deed must remain as it was. The Court (Second Division) held that the remedies provided by the two sections were alternative; and that the Petition was competent. The Lord Justice-Clerk said: "Section 38 provides that certain formalities if omitted may be afterwards appended, but with this proviso, that the instrument shall not have been recorded or founded on in any Court. But section 39 is a general clause, providing that no deed subscribed by the granter, and bearing to be attested by two witnesses subscribing, shall be deemed to be invalid because

of any informality of execution, but that the burden of proof shall be upon the party using the deed."

In *M'Laren and others v. Menzies*, 20th July 1876, the deed, a Will, was executed abroad in the English style. It was written on two sheets, and consisted of five pages, exclusive of the attestation, which was written partly on the sixth page. It was signed on the fifth page only, and the seal, set opposite the signature, was placed upon the thread by which the sheets were stitched together. The testing clause bore that the Will was signed and sealed at a certain place on a certain date, and was followed by the attestation clause proper for an English Will and by the signatures of three witnesses, who, however, had not added their designations. The trustees named in the Will presented a Petition under the 39th section, setting forth the facts, asking to be allowed a proof, and praying the Court to declare that the Will was subscribed by the maker, and by the witnesses, as witnesses attesting her subscription. Answers were lodged for the defenders, and the evidence (which was taken on commission) established the fact that the Will was subscribed by the maker and by the witnesses of the date it bore; that the maker knew the contents of the deed; and that it was signed by her in presence of the witnesses, and sealed by her with her signet-ring. The Court (Second Division) ordered the case to be heard before seven judges, each of whom delivered an elaborate opinion. The question on which the greatest difference of opinion arose, was as to whether a deed consisting of more than one sheet, but subscribed on the last page only, could, although otherwise properly authenticated, be received as a probative writ. That a deed so executed prior to 1st October 1874 was not a probative writ, has since been solemnly decided in *Gardner v. Beresford's Trustees (supra)*, (affirmed, House of Lords), where the deed consisted of seven pages, and was signed by the granter and witnesses on the last page only, and initialed by the granter on each of the preceding pages. But in *M'Laren's* case the Court had to deal with a deed executed after the Act came into operation; and the question was, Whether—the granter of a deed consisting of more than one sheet having signed the last page only—the omission to sign the preceding page was one of the formalities of execution with

which the Act had the effect of dispensing? Space will not allow of our following the reasoning of the judges in this important case; but the result was that the Court (diss. Lord Neaves, Lord Ormidale, and Lord Curriehill) held that it had that effect. The Court therefore decided that the omission did not render the deed invalid; that the production of it in the proceedings under the petition was not "founding on it in Court," in the sense of the Act; and that it was open to the petitioners afterwards to supply the omissions in the designations of the witnesses.

In the petition at the instance of *Brown (M'Intosh's Executor)*, 22nd December 1883, the ruling in *M'Laren's* case was followed. Here the testator left a Will which extended over three pages and on to part of the fourth, with a Codicil which commenced on the fourth, and extended to the fifth page, that page being the first page of another sheet; and the two sheets were stitched together in the usual way. The Will was duly executed and attested; and the Codicil was also signed at the end, on the fifth page of the deed; but by an overlook the testator had omitted to sign at the foot of the fourth page of the deed, being the first page of the Codicil. A Petition was presented under the 39th section, and the facts having been proved, the Court (First Division) decided that *M'Laren's* case, although decided by a bare majority, settled the practice; and they granted the prayer of the petition.

Another question—viz. Whether the Act dispensed with the necessity of the granter signing the deed in the presence of the witnesses or of acknowledging his signature to them?—arose in the case of *Smyth v. Smyth*, 9th March 1876. Here the deed was *ex facie* probative; but it was proved that although the granter had signed the deed, he did so outwith the presence of the witnesses, who had indeed signed it before him, and that he did not acknowledge his signature to them. The holder of the deed contended that, having proved that the signatures were genuine, the 39th section applied. The Court (Second Division), affirming Lord Curriehill, and without calling upon counsel for the parties impugning the deed, held that the section did not apply. Lord Gifford remarked that if the arguments for the holder of the deed were sound, "it

would come to this, that the recent statute had abolished witnesses altogether. It has certainly not done that."

The question as to whether the subscription of instrumentary witnesses *ex intervallo* rendered a deed valid, has more than once come before the Courts; but it was not, until recently, made the subject of judicial decision. It came up in the case of *Home v. Dickson*, June 1730 (M. 16,898), but it was not dealt with, because in that case the parties had not concluded a bargain, or, as the report bears,—“the parties having broke up without perfecting their contract.” The question again arose in *Arnott & Drysdale v. Burt*, 14th November 1872, but it remained undecided; Lord Cowan, however, expressing his opinion that “the intention of the statute (1681) was that the signature of the party and witnesses should be *unico contextu*.”

But in the case of *Stewart v. Burns*, 1st February 1877, it was decided that a deed to which witnesses attached their signatures *ex intervallo* was valid. Here a deed was signed in duplicate in the presence of three persons; but it was not attested by any of them, nor was a testing clause inserted. The deed having been followed by *rei interventus*, one of the parties got two of the persons who were present when the deed was signed, to sign his duplicate as witnesses, and a testing clause was then added to it. The Court (Second Division) held not only that the contract was rendered binding by *rei interventus* which followed on it, but that the testing clause of the duplicate was filled up, and the signatures of the witnesses adhibited competently.

This question, however, received fuller consideration, and was with certain other equally important points decided in the case of *Tener's Trustees v. Tickle and others*, 28th June 1879. Here Mrs. Tener executed a Deed, prepared on her instructions by her husband, who was not a man of business, for the purpose of making over to trustees, for religious purposes, certain property which belonged to her. The Deed was bilateral in its form, being between Mrs. Tener on the one part, and the trustees on the other part. Mrs. Tener signed the deed in presence of her husband and another person; but, as the parties were under the impression that only one witness was required, the husband did not sign as a

witness; and Mrs. Tener's signature was consequently attested by one witness only. Thereafter the deed was transmitted by the husband to one of the trustees, who also signed it, but before only one witness. Mrs. Tener died without, so far as she was concerned, taking any further steps in the matter; but Mr. Tener having in the meantime discovered that the law of Scotland required two witnesses, added—whether before or after his wife's death does not appear—his signature as an instrumentary witness to his wife's subscription of it. Thereafter all the trustees signed the deed in proper form. The trustees under the deed so executed, along with Mrs. Tener's testamentary trustees, presented a Special Case to the Court (Second Division) for Judgment on the question as to whether the deed was effectual to convey to the trustees named in it the property with which it purported to deal. Two questions were submitted to the Court, viz. (1) Whether the informality in the execution of the deed—the facts being admitted—was covered by the 39th section of the Act? and (2) Whether the deed, being of a bilateral form, and not having been executed by the second parties to it during the first party's lifetime, was effectual? On the first point the Court held that a witness did not require to be specially called in order to attest a signature; and that Mr. Tener, having been present and seen his wife sign the deed, his attestation of the deed *ex intervallo*—either before or after death, this point being, in the opinion of the Court, immaterial—made it valid; and on the other point, that although the deed was in its form a mutual Indenture, it was in its substance a unilateral Conveyance, delivered during the granter's lifetime, and that it was sufficiently accepted by the signature attached to it of one of the persons who were to administer it.

These notes of the decisions on what we may call the *miscellaneous* sections of the Act are not so numerous, or so divergent, as to call for any classification further than what has been given to them by noting them under the sections to which they apply; but it may be worth while to deduce the results of the decisions under the 38th and 39th sections. These appear to us to be—(1) That these sections are not retrospective; (2) that they do not sanction any departure from the

rules requiring the granter of a deed either to sign in the presence of the witnesses or to acknowledge his signature to them; (3) that the sections are alternative; (4) that if an incomplete Deed is produced in process, at the call of a party pleading an interest adverse to it, it is not, in these circumstances, founded on in judgment in the sense of the Act; (5) that if the opportunity of using the remedies introduced by one section has been allowed to pass, the procedure provided in the other section may be resorted to; (6) that a deed subsequent in date to 1st October 1874, which consists of more than one sheet, and which is signed by the granter on the last page only, is not invalid; and (7) that instrumentary witnesses need not be specially called, and that subscription by them *ex intervallo*, and even after the death of the granter of the deed, is a good attestation.

In closing these papers, we may say that we have avoided all speculative questions, and confined our attention to the decisions as they stand. If, on the one hand, we have occasionally obtruded on the reader points of law which are as well known as they are firmly settled, and, on the other hand, we have, in some instances, burdened the paper with unnecessary details from the cases quoted, we have done so for the purpose—not otherwise to be effected—of bringing out clearly the results of the various decisions; the changes, where changes have taken place, in the law as it formerly existed; and the principles on which these changes have proceeded.

THE REMNANT OF THE JURY IN SWEDEN.

HERR GUSTAF EDW. FAHLCRANTZ, of Stockholm, contributed to the December number of the *American Law Review* a long and interesting paper, on the subject of the remnants of the system of trial by jury which survive in Sweden at the present. He gives a full account of that quaint and anomalous body, the *Næmd*, and discusses its merits at length. "It is a remarkable fact," says Herr Fahlcrantz, "that, during several centuries, trial by jury has been in Scandinavia the regular method of ascertaining the truth in civil actions. It is probable that the English jury was derived from this source. At this day,

in the most important of the Swedish law courts, the *Hörradsrätterna*, twelve men of the common people always sit at the side of the judge. At the same time, it is probable that there is no country in Christian Europe in which less remains of the spirit of the system of trial by jury than in Sweden.

"In old times, the trial by jury was used with us in both civil and criminal actions, although only in the most important cases of either sort. The regular number of jurors was twelve, and they were appointed by the judge, although the parties had a certain power of approving or rejecting them, analogous to the right of challenge under the Anglo-American systems. The ordinary province of the jury was to ascertain the facts or truth of the controversy, although there is every reason to believe that the distinction between fact and law was not very clearly defined. It was the province of the judge to apply the law to the facts as they were thus found by the jury. After the jury had given their verdict it could not be altered, except that it might be overridden by the prerogative of the king, which extended to the finding out of the real truth of every case.¹

"At a later period, the twelve men began to take upon themselves the office of deciding the law; and in the meantime the system had so far changed, that instead of the use of the jury being confined to certain cases, jurors sat by the side of the judge in all cases which came before him when he held the assizes in his circuit.

"Since that time, the system has gone through many changes, too numerous to speak of here. It may be enough to say that, when its power was at this height, and during a very considerable period of its existence, it constituted a jury system, so to speak, in as full a sense as the English jury system ever did, save only in name: the twelve men, although they were *sworn*, were never in Sweden called *jurors*, and were never said to form a *jury*. They were called '*næmdemen*,' and all together they constituted a body called a '*næmd*,'—a designation which refers to the fact of their being *named* or selected as fiduciaries or representatives of the freemen of the district.

"From the middle of the fifteenth century the degeneration

¹ "Sannind uthleta."

of the *næmd* as a jury went on rapidly. One of the most efficient means of this deterioration was the extension, as above stated, of their functions beyond their proper boundaries, that is, to the decision of matters which they could not in any way understand, namely, questions of law.

"At the present time the position of the *næmd* is substantially this. A *næmd* exists only in the country districts; all the cities and smaller towns have courts of their own, composed of three or more judges. But in each of the country districts or hundreds, three or four—sometimes more and sometimes less—of which form a circuit, there always exists a *næmd* of twelve good and lawful men, all, or at least seven of whom regularly sit with the judge whenever he performs any of his judicial functions; so that he is not able to make a formal decision, or to perform any formal act as a judge, unless these twelve men, or at least seven of them, are sitting at his side.

"These *næmdemen* are selected by the inhabitants of the districts in the ordinary way in which municipal officers are selected; they are elected for six years, and have no salaries. Before entering upon the duties of their office, they are obliged to take an oath of the same character as the oath which is administered to the judge, they being in theory judges. But there is this remarkable distinction between his functions and theirs: he cannot act without having at his side at least seven of them, but he decides every question if only one of them join with him. They, on the other hand, can overrule the judge only by a unanimous vote. What is here said applies to questions of law as well as to questions of fact, and indeed to all formalities of procedure—to every point on which a decision has to be given by the Court.

"An important consequence of this system is that, when a cause is called for trial,—that is, one which would regularly be tried by the jury in America,—there is never any trouble beforehand in selecting a jury, because the official jury are already in court; and it is considered as in good order for them to take their places in the hall before the judge enters upon his daily session.

"The parties have indeed a right of challenge analogous to that which exists under the Anglo-American system, but only

for such causes as would disqualify the judge. If such a challenge is interposed, as is sometimes done, it is decided by the judge, and not by the other *næmdemen*."

(To be continued.)

Appointments.

MR. HECTOR W. MACLEOD, ADVOCATE.—In our last number we announced that Mr. Hector W. M'Leod had been appointed Chief-Justice of St. Lucia. The announcement, which was taken from an English legal contemporary, and which appeared also in most of the daily papers, proves to be quite a mistake. Mr. M'Leod has not received this appointment, and he was not an applicant for it; indeed, we regret to learn that the present state of his health forbids his accepting any such post. We understand that the Colonial Office have at present under their consideration the question of the constitution of the Court of Appeal for the Windward Islands, and that it is not their intention, in the meantime, at all events, to appoint a new Chief-Justice of St. Lucia.

Obituary.

WE deeply regret to announce the death of **LORD FRASER**, which occurred just as we were going to press. A full notice of this eminent Judge will appear in our next Number.

MR. JONATHAN MELROSE, Solicitor and Banker in Coldstream, died there on 27th February.

MR. HUGH ROSE, Inverness, one of the best known Solicitors in the north of Scotland, died on 4th March. Mr. Rose held several public offices.

MR. JOHN WALLS, Solicitor before the Supreme Courts, died in Edinburgh on 10th March. He was a native of Orkney, and was admitted to the S.S.C. Society in 1850.

MR. JAMES BARTON, Solicitor before the Supreme Courts, Edinburgh, died on 18th March.

The Month.

Spring Vacation Box Days.—The Lord Ordinary officiating on the Bills will sit in Court on Wednesday, 10th April, and Tuesday, 30th April, each day at 11 o'clock forenoon, for the disposal of motions and other business falling under the 93rd section of "The Court of Session Act, 1868;" and Rolls will be taken up on Monday, 8th April, and Saturday, 27th April, between the hours of 11 and 12 o'clock.

* * *

Spring Circuits.—The following Circuits are fixed for April: *South* (Lords Mure and Wellwood; Mr. Wallace, Advocate-Depute; Mr. McCosh, Clerk of Court), Ayr, 2nd inst.; Dumfries, 9th inst.; and Jedburgh, 11th inst. The *North* Circuits were finished in March. The only sitting was at Dundee (Lord Young), where the Fife cases, which would in the ordinary course have been tried at Perth, were heard. On the *West* Circuit this season no sitting was held at either Stirling or Inveraray. The Glasgow Circuit will begin on 9th May, before Lords Adam and M'Laren.

* * *

Small Debts (Scotland) Bill.—A Bill has been brought into the House of Commons having for its object "to extend and amend the law relating to the recovery of small debts in Scotland." It proposes to extend small-debt jurisdiction from cases involving £12 and under to cases involving not more than £25.

* * *

Suicide and Life Insurance.—A case arising out of very exceptional circumstances was decided in America the other day. A policy of insurance provided, "if the assured shall die in consequence of the violation of any criminal law of any country, State, or territory, in which the assured may be, this certificate shall be null and void." *Held*, that suicide committed by an alleged fugitive from justice, to avoid arrest and trial for a crime committed by the assured, is not to be

considered as the proximate result of the alleged crime; and that his death by suicide is not, within the proper meaning of the policy, to be considered as the violation of law therein referred to. — *Kerr v. Minnesota Mut. Ben. Assn.*, Sup. Ct. Minn., 59 N. W. Rep. 312.



A Truthful Judge.—"I have a number of authorities bearing directly upon this point, if your Honour would like to hear them," said a young attorney recently in one of the Massachusetts Courts. With a weary smile the judge replied, "I cannot truthfully say that I should like to hear them, but I suppose it is my duty to listen to them."—*The Green Bag*.



The Grounds of Judgment.—Two judges at General Term having given opposing opinions on a matter of slight importance, the question was settled by Judge —— quietly stating, "I agree with my brother A., for the reasons given by my brother B.!"—*The Green Bag*.



A Remit narrowly avoided.—Mr. Baron Pollock has a strong aversion to trying cases which involve questions of accounting. The other day, in opening a case before his Lordship, the counsel for the plaintiff mentioned that his client's husband had gone to "his long account." The learned judge pricked up his ears at once. "What is that?" he exclaimed,— "a long account? I am not going to try a question of account. I shall refer this case." Counsel had to explain, in order to avoid an instant remit.



A Concise Law.—We recommend to the notice of all legislators, parliamentary draftsmen, framers of Acts of Sederunt, and conveyancers in general, the following passage, which we translate from M. Pradier-Fodéré's article on "Spanish America," in the latest number of the *Revue de Droit International*. Slavery has been abolished in Brazil. "The abolishing law of 13th May 1888 is short and concise. It runs thus:—'Article I. Slavery is hereby abolished in Brazil

from the date hereof. *Article II.* All provisions to the contrary are hereby revoked.’”

* * *

The University Law Classes.—The recent Act of Sederunt, which removed the necessity of attendance at law classes as a qualification for admission to the examinations for law agents, does not appear, as yet at all events, to have exercised much influence in the way of deterring apprentices from taking out University classes. We are glad to learn that the average of attendance at the law classes in the University, which the change in the regulations might have been expected to affect, is being well maintained.

* * *

Cause and Effect.—"I hear," said somebody to Jeckyll, "that our friend Smith the attorney is dead, and leaves very few effects." "He could scarcely do otherwise," returned Jeckyll, "he had so very few causes."—*American Law Review.*

* * *

Judge Lynch and Judge Law.—As is well known, there are two Courts in America of co-ordinate criminal jurisdiction in capital cases. Last year Judge Lynch had decidedly the whip hand of Judge Law. The former bagged 144 to the latter's 87. The total for the States was 231. In no other civilised country is there any such record as this in proportion to the population. What it means may be gathered from the consideration, that whereas in Scotland executions at present average much less than 1 *per annum*, at the American rate there would be 20 *per annum*.

* * *

Lawyers' Recreations.—The men who join recreation with work are the happiest. Sir Charles Romilly took care that his mind should play every day. He used to travel on the Circuit in his own carriage, and carry with him the best books of the day. A friend riding with Sir Charles expressed his pleasure at seeing that the busy lawyer found time for such reading. "So soon as I found," he answered, "that I was to be a busy lawyer for life, I strenuously resolved to keep up my habit of reading books outside of the law. I had seen so

much misery in the last years of many great lawyers, from their loss of all taste for books, that I made their fate my warning." Some men unbend by giving themselves for a season to pursuits wholly unlike that by which they earn their living. An English Vice-Chancellor found recreation in binding books. He was an adept at the trade, and the volumes he turned out were bound in masterly style.—*Companion*.



Forms of Oaths.—Bavaria—I swear . . . So help me God and His Holy Gospel. Denmark—I promise and swear . . . So help me God and His Holy Word. Greece—I swear in the name of the Holy and Consubstantial and Indivisible Trinity. Hesse Darmstadt—I swear . . . So help me God. Saxe-Coburg and Baden—I swear . . . So help me God. Holland—I swear . . . So help me God. Portugal—I swear on the Holy Gospels. Prussia—I swear by God, the Almighty and Omniscient . . . So help me God. Saxony—I swear by Almighty God. Servia—I swear by one God and with all that is according to law most sacred and in this world dearest . . . So help me God in this and that other world. Spain—After swearing on the Gospel, the president says: "Then may God repay; but if you fail may He claim it from you." Sweden and Norway—I (president or vice-president only) swear before God and His Holy Gospel . . . I will be faithful to this oath as sure as God shall save my body and soul. Switzerland—In the presence of the Almighty God I swear . . . So help me God. United States—I do solemnly swear . . . So help me God. In Bavaria non-Christians omit the reference to the Gospel. In Holland and the United States affirmation is optional. In Prussia and in Switzerland affirmation is permitted to those who object on religious grounds to the oath. In Austria a promise is in every case substituted for an oath. In Belgium and Italy the abjuration is used without any Theistic reference; and in France and Roumania, the German Reichstag, and for deputies in Sweden and Norway, neither oath nor affirmation is demanded.



Betting and Betting Agency.—A comparison of the case of *Cohen v. Kittell*, decided by Baron Huddleston and Mr. Justice

Manisty the other day, with the case of *Read v. Anderson*, 13 Q. B. 779, would at first seem to disclose a discrepancy in the result. In *Read v. Anderson* it was held that a betting agent, who, acting on a constituent's authority, had made a bet, lost it, and paid the bet, was entitled to recover the amount so paid from his constituent. In *Cohen v. Kittell* an agent failed to make certain bets which he undertook to make. Had the bets been made, a considerable sum would have been recovered. In these circumstances the Court held that the constituent could not recover from the agent the amount which he ought to have won. On close examination, the two decisions are found not to be so inconsistent as at first they appear. The *ratio* of the older case was this: a bet, although not enforceable, is not *contra bonos mores*. A direction to make a bet implies an authority to pay if the bet be lost; and there is nothing illegal in A. authorizing B. to make a payment on his behalf in a certain event to C. If B. acts on the mandate, he is entitled to recover from A., no matter what was the purpose of the payment, always provided it was not one *contra bonos mores*. The second case, on the other hand, was decided on the general principle of the law of agency: that no action will lie for breaking an agreement to make a contract which will at law be null and void—be no contract at all. Had the bet been made, and the sum won been paid to the agent, the principal could have recovered from him (*Bridges v. Savage*, 15 Q. B. 363). But even if the bet had been made, the winnings could only have been obtained, not by operation of law, but by what in the eye of the law would have been an accident—the willingness of the loser to pay. From a strictly legal standpoint, the loser, if he pays, does not pay a debt, but makes a gift; and an agent cannot be made liable in damages because he has not secured a gift. A nice question arises where the party who loses the bet interpellates the agent from paying it. This happened in *Read v. Anderson*, where the Court held that, as the agent might have been expelled from the subscription rooms if he failed to pay, the principal was not entitled to recall his authority to pay after authorising the bet. But this seems scarcely consistent with the doctrine laid down in *Cohen v. Kittell*, that the payment of a bet is in the eye of the law a mere accident.

A Well-deserving Pillar.—"We learn," writes *The Sierra Leone Weekly News* (Freetown) of February 9th, "that, owing to the illness of His Honour Chief-Justice Quayle-Jones, the duties of his office devolve upon the Queen's Advocate, Hon. J. K. Donaldson, who has just returned from his six months' leave, very much refreshed and invigorated. The community feels a genuine satisfaction in having among us again the Queen's Advocate, who, whether on the Bench or at the Bar, never fails to impress the people of all classes, professional or laymen, with his high sense of duty and his unswerving and incorruptible adherence to the cause of justice. He reproduces in his constant practice, what in the case of some others of his profession and position we have only had in symbol, namely, the ideal Justice as blindfolded, and holding with even hand the balance between right and wrong. We are not aware that the Queen's Advocate has any special regard for what we say or do not say in his praise or dispraise; but, as public journalists, labouring in the interest of all, and especially for the promotion of all the true and prominent interests of Africa, we cannot but recognise—though our recognition may bring neither emolument nor honour to its object—those who are friends to right, to truth, to justice, without fear or favour. In a fine passage, the Roman orator, Cicero, said, that glory follows the truly great man, as the shadow follows him who is moving towards the sun. The man who is pursuing his course towards the sun of right and truth must, in spite of detraction and abuse, be followed by real and imperishable honour. If any word of encouragement from us can do any good—*si quid mea carmina possint*—no man whom we believe to be in earnest for truth, right, and justice, will fail to receive from us all the support which our feeble pen can give him. We congratulate the Queen's Advocate on his safe return among us, and on the resumption of the duties which he has so ably, impartially, and faithfully performed in the past."



A Sensational Scene in Court.—The celebrated Sharon divorce case, which has occupied the attention of the Pacific coast for a number of years, culminated in a sensational

incident, which resulted in placing Sarah Althea Sharon, now Mrs. David S. Terry, in jail for thirty days, and her husband, Judge Terry, for six months. The Supreme Court of California a few months ago announced its decision in the case, sustaining the decision of the State Superior Court, which declared that Mrs. Terry had been legally married to the late ex-United States Senator, William Sharon, and that she was entitled to a portion of Mr. Sharon's estate. A short time after the announcement of this decision by the State Supreme Court, the executors of the will of the late William Sharon made an application to the United States Circuit Court for a bill to revive and carry into execution the decree of the Circuit Court, entered in September 1885, in the suit of William Sharon against Sarah Althea Hill, to obtain its decree, adjudging certain papers in her possession, purporting to be a marriage contract between them, to be forgeries, and directing their cancellation and forbidding their use in any manner. The decree entered by the Circuit Court in this case was in favour of the plaintiff, and declared the alleged marriage contract a forgery; but in the meantime the Sharon divorce suit was pending in the State Courts, and William Sharon had died.

When the executors recently applied to the Circuit Court for a bill of revivor, Sarah Althea Hill, who has since become Mrs. Terry, entered a demurrer, and a decision was entered upon that demurrer, which the Court overruled. The decision, which was lengthy, was read by Associate Justice Field, of the United States Supreme Court, and was concurred in by Judge Sawyer, of the Circuit Court, and Judge Sabin, of the District Court. The former decision of Judge Sawyer, declaring the alleged marriage contract a forgery, and ordering the defendant to deliver it up for cancellation, was sustained, and the executors were given the right to handle Sharon's property untrammelled by any action on the part of Mrs. Terry.

The announcement that a decision in the Sharon case would be rendered, drew a large crowd to the United States Court-room. About two hundred lawyers, besides all the parties directly interested in the case, occupied the enclosure immediately in front of the judges. Judge David S. Terry, who has been the chief counsel for his wife during the entire litigation, sat alongside of his wife, and both paid close atten-

tion to the reading of the decision. Mrs. Terry appeared nervous at the outset, and, as the reading progressed, her agitation increased. Finally, when Judge Field was about half through reading, Mrs. Terry jumped to her feet, and asked, the judge if he was going to order her to give up her marriage contract. The judge quietly told her to sit down. Mrs. Terry's face turned white with passion, and she cried, "Justice Field, we hear that you have been bought. We would like to know if that is so, and what figures you hold yourself at. It seems that no person can get justice in this Court unless he has a sack." Judge Field turned to Marshal Franks, and said, "Marshal, remove that woman from this Court-room." The marshal advanced towards Mrs. Terry, but she took no notice of him, but broke out with oaths and vulgar language. Franks grasped her arm, and in an instant Judge Terry arose, and exclaimed that no living man should touch his wife. With this he dealt Franks a terrible blow on the neck with his fist, which sent the marshal rolling across the floor. Franks regained his feet, and, with several deputies and bystanders, rushed upon Terry and quickly removed him. Mrs. Terry was also taken from the room and locked up in the marshal's office. A deputy was placed at the door, when Terry advanced upon him and demanded admission, which the deputy refused. Terry put his hand in his pocket and drew forth a dangerous-looking dirk, with a blade eight inches long, and with a curse held it above his head and declared he would stab any man who dared keep him away. Several others at once jumped upon him and tried to take the knife away. A desperate struggle followed. All the men fell to the floor, and the knife was finally taken away from Terry without any one being injured. Terry was then locked in a room with his wife. A satchel which Mrs. Terry had dropped in the Court-room during the excitement was found to contain an English bulldog revolver, with all six chambers loaded. Marshal Franks states that she was trying to open the satchel just before she was put out of the Court-room. Later, Marshal Franks entered the room where the two were confined. Mrs. Terry at once made a violent attack upon and beat him about the face and head. She was soon quieted, however, and a guard placed in the room. The wildest excitement had prevailed in the

Court-room and corridors during the disturbance, but as soon as quiet was restored Judge Field resumed the reading of the decision. When he had concluded, the Court took a recess, and the judges retired to their chambers. Two hours later, they again appeared in the Court-room, and announced the penalty they had inflicted upon Judge Terry and his wife. Neither of the parties was allowed in Court while the sentence was being pronounced. Judge Field ordered that Terry be imprisoned in the county jail six months, and that Mrs. Terry be imprisoned thirty days. No alternative in the way of a fine was allowed, and the prisoners were taken to the jail that afternoon. David S. Terry was formerly a judge of the Supreme Court of this State, and, while holding that position in 1856, became involved in a quarrel with David C. Broderick, who was then United States Senator from California. A duel followed, and Broderick was killed.

Reviews.

The Law of Damages : A Treatise on the Reparation of Injuries, as administered in Scotland. By JOHN GUTHRIE SMITH, Advocate, Sheriff of Aberdeen, Kincardine, and Banff. Second Edition. Edinburgh: T. & T. Clark, Publishers.

THE learned Sheriff writes with modesty, for, at the outset, he disarms criticism by the confession that, "with all its additions and alterations, the book is still far from being either accurate or complete." But even if that be true, Mr. Guthrie Smith can claim for his treatise what another distinguished author asserted of his handiwork, that it "holds the field." The volume before us is the only work upon the law of reparation as administered in Scotland, and the importance of that branch of the law to the practitioner, as well as the wide respect in which the author is held, will secure the book a place in every legal library. It is now some twenty-five years since the first edition of the work was published, and, as Mr. Guthrie Smith points out, the law of reparation has been not only very much developed, but, to a certain extent,

"made" since that date. We rather think, however, that Mr. Guthrie Smith overstates the advance which has been made in recent years. "The true development," he says, "of the principles of the law of damages began with the present Lord President." We know one very eminent authority who we are quite sure would not subscribe to this statement—the Lord President himself, who would tell Mr. Guthrie Smith that the *principles* of the law of damages received their authoritative exposition two centuries ago at the hands of the first Lord Stair. Development, illustrations, and applications these principles have certainly received from Lord President Inglis, but the principles themselves were well ascertained by cases which are to be found not in Rettie or Macpherson, or even in Shaw or Dunlop, but in the monumental volumes which bear the classic name of Morison, who took infinite trouble in verifying the references and revising the work in its passage through the press. The very circumstance that the former edition of Mr. Guthrie Smith's work was not infrequently consulted, even up to the date when this new volume appeared, shows that the principles of the law of damages are not so entirely the creation of the last thirty years as our author represents them to be. Indeed, we think that most of the principles—in fact, all the ruling principles of the law which are to be found in the work before us—have their place in the earlier volume. No doubt new principles have been laid down in regard to new relations of society, and to new classes of questions which have arisen out of fresh departures in legislation. Apart from these, we know of no principle of the law of reparation which was not clearly ascertained when the former edition was issued. But in the interval there have doubtless been an immense number of cases in which the application of the principles of the law, in all kinds of circumstances and situations, has been ascertained and expounded by the Court. A classification of these, and an analysis of their results, along with a guide where to find the apposite authority, will be of great service to the practitioner. The task of re-clothing the dry bones of a quarter of a century ago is generally passed down to younger shoulders. But Mr. Guthrie Smith, with characteristic energy, has done the work himself, and has brought the benefit of

his wide experience both of supreme and inferior Court practice to his assistance in the undertaking. He has thereby been enabled to give effect to an opinion to which he has often given expression, viz. that diffuseness, however excusable, and indeed at times commendable, it may be at the Bar, is out of place in the text-book, which should state the law and quote the authority for the proposition within as short a compass as possible.

We are not sure, however, whether our author's zeal in this direction has not been carried too far, and the book before us is perhaps open to the observation, that for our only exposition of perhaps the most important branch of the law, the work is somewhat "slight," that it is a handbook rather than a treatise, and hardly bears the stamp of "institutionalism." Moreover, in his efforts to be concise, Mr. Guthrie Smith has sometimes been tempted to be elliptical to the extent of inaccuracy of expression. The description of the work upon the title-page, as printed above, is an example of this. In the Preface, too, we read, that "of recent years injuries to person and property have formed a large part of the business of the Supreme Court as well as the Sheriff Court, particularly the latter;"—a statement which suggests pleasant visions of the Lord Justice-Clerk pounding Lord Lee with the mace, and Sheriff Crichton whittling the bench with a penknife, for want of any other work to do. Again, malice in law is defined as "whatever is done consciously, without just cause or excuse;"—a definition comprehensive enough to include equally suicide and smoking in the drawing-room, criminal abortion and *cutting* a dance, high treason and wearing an eyeglass without being near-sighted. Under the head of seduction, again, we read, "When applied to the conduct of a man towards a woman, the word seduce has a specific legal signification. It means carnal intercourse." Now, one knows what Mr. Guthrie Smith is driving at, but that is just because one knows beforehand what he is trying to explain, viz. what seduction signifies. But suppose a person quite ignorant of the meaning of the word were to turn to this work for enlightenment, he would certainly conclude from the passage quoted above, that seduction was a synonym for sexual connection, and that accordingly every

member of Adam's race had his origin in seduction. Our conception in sin was surely not so literal as this comes to. Our author would have been equally just had he written, "When applied to the conduct of a man towards a woman, the word 'ravish' has a specific legal significance. It means carnal intercourse." The examples which we have cited show that brevity may be overdone, and that statements may be so concise as to be neither lucid nor accurate.

We have no doubt that the volume before us, with all allowance for shortcomings, will maintain the reputation of its predecessor, and will long occupy the ground as the recognised treatise upon this important branch of the law. We congratulate Mr. Guthrie Smith on the completion of a task which must have been laborious, and none the less so that the work might easily have been so much larger. Adequate compression is often the most difficult task of all, and requires a careful study of every case quite as much as does the most ample exposition. In point of form the work leaves nothing to be desired—the paragraphing, spacing, and printing showing a great advance upon what, up till quite recently, one was accustomed to find in legal publications.

The Complete Annual Digest of every reported Case in all the Courts, for the year 1888. Edited by ALFRED EMPDEN, Barrister. London: William Clowes & Sons Limited. 1889.

THIS is the sixth volume of the Annual Digest, the object of which is to keep the practitioner up to date, by placing in his hands a note of the effect of every case decided in the course of the year immediately preceding, with a reference to the reports of the case. Besides all the English cases, a note is given to Scottish and Irish decisions of general importance, and there are also references to leading American cases. Human society is now so complex, and business and commercial arrangements are so involved, that there are few leading principles of law which do not receive a fresh development, or an application to a new class of circumstances, in the course of the year. It not infrequently happens that a practitioner is quite thrown out of his bearings, because he

has contented himself to look up the law only down to the date of the last text-book, or the last general digest, or even the last volume of the ordinary reports, and has overlooked a decision only a few months old. This is specially apt to be the case with the Scottish practitioner in regard to English decisions. These considerations make clear how valuable is such a publication as that before us to the practising lawyer. A glance at the heading of the subject he is on will satisfy him whether during the past year there is any new authority which will help his case, or which he must be prepared to meet and to differentiate from the case in which he is engaged.

The Law Examination Manual for Students: Containing Conveyancing, Scots Law, and Court Practice, in the form of Tables and Abstracts; the Latin Maxims in Bell's and Erskine's Principles; and numerous Examples of the Examination Questions. Compiled by WILLIAM WHYTE, Solicitor Supreme Courts. Edinburgh: T. & T. Clark.

HUMAN ingenuity has not yet been able to suggest a mode of abolishing examinations, while at the same time securing competency and efficiency in the learned professions. Meantime, at least, the examination system holds the field. Abridgments, cram-books, *et hoc genus omne*, are, therefore, much in request. The true use of all such compilations, and the apology (if any is needed) for the appearance of Mr. Whyte's present work, is well and succinctly stated in his Preface. "The object of the book," he says, "is not to enable the student in any way to dispense with a careful study of the prescribed text-books, but to assist him in his preparation for examinations, by placing before him the subjects chosen, in a clear and easily mastered form, which will be of great use in a revision of his work." The book shows signs of having been very carefully prepared. Its statements are clear, its divisions are accurate and perspicuous, and it is well adapted to its purpose. We may note in particular Mr. Whyte's novel departure in including a list of Latin maxims, with a free translation of each. This

cannot fail to be of real service to many law students, whose acquaintance with Latin is slender at best, and is wholly unequal to understanding the abrupt, disconnected, amputated phrases which so frequently occur in the Scots Institutional writers.

The Patents, Designs, and Trade Marks Acts 1883 to 1888 consolidated. With an Index. By LEWIS EDMUNDS, D.Sc., LL.B., of the Inner Temple, Barrister-at-Law. Stevens & Sons. 1889.

THE object of this work is to present the four Patents, Designs, and Trade Marks Acts, now in force, in a continuous form, and so as at once to show the recent statutory alterations on the principal Act of 1883. The text of the amending Acts of 1885, 1886, and 1888 has been added in the appropriate places; at the same time, the original text of the Act of 1883 is wholly retained; the repealed portions being printed in italics, and the alterations being inserted in large type. Not the least noteworthy feature in the book is an admirable and exhaustive index.

Mr. Edmunds has done his work well, and his book will be of great value to lawyers, and others interested in the important and intricate subject with which it deals. The name of Messrs. Stevens & Sons is a sufficient guarantee for accuracy of printing, clearness of type, and elegance of binding.

The Green Bag: A Useless but Entertaining Magazine for Lawyers. Edited by HORACE W. FULLER. Vol. I. No. 1. Boston: Charles C. Soule.

WE have received the first number of this new venture in the field of legal periodicals, and, if this issue be a fair sample of what is to come, we can safely predict its success. We confess we should have felt more highly flattered at Mr. Fuller's having republished our recent paper on the White-chapel Tragedies, had he not described his journal on its title-page as "a *useless* but entertaining magazine!" The matter throughout is good, and not at all useless—though happily free from all heaviness and dulness. An excellent portrait of

Chief-Justice Fuller is prefixed to a short biographical sketch of that learned judge. The various papers are of a kind to prove interesting to members of the legal profession in this country, and not merely to those in America. We may add that the new magazine is a model of good printing and of attractive form.

Revue de Droit International et de Législation Comparé. Tome XX., 1888, Nos. 5, 6.—Probably the majority of readers will consider Professor Geffcken's article on "The Maritime War of the Future" as the most interesting contribution to the fifth number of the *Revue*. The author deals lucidly with the subject, and shows that he is thoroughly informed as to both skilled opinion and current events in Britain. There are articles on "Contracts of Public Utility," by M. Sainctelette, and on "The Jews in Belgium," by M. Demeure, and we find the usual communications relating to the Institute. An extremely interesting article on Spanish America, by M. Pradier-Fodéré, appears under the head of the Record of International Events. The sixth number contains an article on the "Cutting" affair by M. Rohn, and M. Asser writes on the subject of the Constantinople Agreement of last year in regard to the free use of the Suez Canal.

English Decisions.

ADMINISTRATION OF ASSETS. — *Executry estate — Business of testator carried on by executors — Rights of old and of new creditors.*—In accordance with directions contained in his will, a testator's business was carried on, after his death, by his executors, who, in the course of doing so, contracted certain debts. In a question as to whether the business creditors of the testator at the time of his death were entitled to be paid out of the entire assets of the business as they stood at a period subsequent to his death,—*Held* (reversing *Bristowe, V.C.*), that the creditors of the testator at the time of his death were entitled to be paid in priority out of such of the assets of the business existing at the time of his death as still remained *in specie*; but the executors were entitled, in priority to the testator's creditors at the time of his death, to be indemnified out of such part of the assets as had been acquired by them since the testator's death, against all debts and liabilities incurred by them in carrying on the business; and that the creditors of the executors, in respect of those debts and liabilities, were entitled to stand in

the place of the executors as regarded that right to indemnity.—*Re Gorton*; *Douse v. Gorton*, Ct. of App., 7 Feb. 1889.

EVIDENCE.—*Experts in foreign law*—*Reference to foreign code*—*Power of Court to look at code*.—In a case involving questions of foreign law, that law being proved by foreign advocates, who, in their affidavits, referred to a foreign code as containing an accurate statement of the foreign law,—*Held*, that where such a witness stated that any text-book, decision, code, or other legal document truly represented the foreign law, the Court was at liberty to regard the document, not as evidence *per se*, but as part of the testimony of the witness, and to give effect to it as to any other part of the evidence of the expert.—*Concha v. Muriella*, Ct. of App., 15 Feb. 1889.

MORTGAGE.—*Payment of mortgage debt by third party*—*Right to have mortgage kept alive*—*Subrogation*—*Right to follow trust money*.—Trustees of leasehold property subject to a mortgage of £1000, being called upon by mortgagee to pay off £600 of the debt, borrowed for this purpose £600 from third parties, the trustees of another fund. The persons beneficially entitled thereafter obtained a reconveyance to themselves of the property, and the lenders now claimed from them a declaration that they (the lenders) were entitled to a charge on the property for £600, with interest, and to the benefit of the mortgage to that extent, and that the beneficiaries were trustees of the mortgage for them. *Held*, that the lenders were entitled—(1) to have the mortgage kept on foot for their benefit to the extent to which they had paid off the debt; (2) to stand in the shoes of the trustees at whose request they had lent the money; and (3) to follow the £600 as trust money.—*Patten v. Bond*, High Court, Ch. Div. (Kay, J.), 21 Feb. 1889.

COMPANY.—*Costs*—*Petition to wind up*—*Withdrawal of petition*.—After presentation of a petition for winding up a company had been presented by a creditor in respect of a judgment debt, petitioner agreed to accept a security for his debt, and asked to have the petition dismissed. Two contributories, who, in answer to the advertisement of the petition, had appeared in order to oppose it, claimed that they were each entitled to a separate set of costs from the petitioner, and not merely to one set of costs between them, on the ground that the merits not having been gone into, the Court had no means of knowing whether parties appearing would have been successful or not. *Held*, that a hard and fast rule as to costs is not to be laid down, but that the Court will look narrowly at the circumstances of each case, to see whether parties appearing were justified in appearing separately; and in present case one set of costs was allowed between the two contributories.—*Re Criterion Gold Mining Co.*, High Court, Ch. Div. (Kay, J.), 23 Feb. 1889.

SHIP.—*Ship at wharf*—*Injury by taking ground*—*Implied contract by wharf owner*.—Plaintiff, the owner of a steamship, made an agreement with defendants, the owners of a wharf on a river, to load and discharge his steamship at their wharf. At the wharf there was a jetty running into the river, and it was necessary to moor the ship

alongside the jetty, and it was also necessary that she should take the ground at every tide. While so moored, the ship took the ground, and sustained injuries, owing to the uneven nature of the bed of the river. In an action to recover compensation,—*Held*, that it was an implied term of the contract that the defendants had taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel using the wharf in the ordinary way; that defendants had failed to take such care; and that plaintiff was entitled to damages.—*Re The Moorcock*, Ct. of App., 25 Feb. 1889.

TRADE MARK.—*Fancy word—Invented word—Patents Act, 1883, sec. 64—Patents Act, 1888, sec. 10.*—An application, made in 1887, to register "Oomoo" as a trade mark in respect of wines and spirits, by an applicant trading as the Australian Vineyards Association, was opposed by the Australian Wine Company, on the ground that the word was similar to "Emu" (the bird and the word being their registered trade mark); and also that the word being an adjective in the aboriginal language of Australia, signifying "choice," was not an "invented word, or a word having no reference to the character or quality of the goods" under Act 1888; or, if that Act was not retrospective, was not a "fancy word" within Patents Act, 1883. *Held* (by Mr. Justice Chitty), (1) that the objection as to similarity failed; (2) that section 10 of the Act 1888 was not retrospective; and (3) assuming that the word "Oomoo" did mean "choice" among the aboriginal Australians, it carried no such meaning to any considerable number of Englishmen, and was therefore a "fancy word" within the meaning of the Act of 1883.—*Re Burgoyne's Trade Mark*, High Court, Ch. Div., 28 Feb. 1889.

ARBITRATION.—*Agreement to refer—Action in High Court—Motion to stay proceedings—Discretion in Court.*—Plaintiff and defendant, surgeons, agreed to carry on business in partnership; that all salaries, remunerations, or other profits, "and all pecuniary presents and gratuities from patients, and all other professional emoluments," should be accounted for as profits of the business; and that all differences with regard to the construction of the articles of partnership should be referred to arbitration. One of the patients attended by plaintiff died, appointing him her executor, and leaving him a legacy and the residue of her personal estate. Defendant claimed half of these legacies as pecuniary presents, and wished to refer the question to arbitration, and he appointed an arbiter. Plaintiff thereupon issued a writ asking to have the matter determined by the High Court; and defendant moved to stay all proceedings in the action, on the ground that the plaintiff had agreed to refer all disputes to arbitration. *Held* (by Mr. Justice Kay), that the matter would better be decided in the High Court, though clearly within the agreement of parties to refer disputes to arbitration. The Court having a discretion, he, in exercise of that discretion, refused to stay proceedings.—*Lyon v. Johnston*, High Court, Ch. Div., 1 Mar. 1889.

CONTEMPT OF COURT.—*Newspaper criticism on issues—Action commenced—Knowledge.*—On a motion by defendant to commit to prison the editor and printer of a newspaper, on the ground that a certain article published by them after the action was begun, and which reflected on matters in issue, was calculated to interfere with the free course of justice, the respondents submitted that at the date of publication they were ignorant of the fact that proceedings had been commenced. *Held* (by Mr. Justice Chitty), that the doctrine of the Court as to *scienter* and contempt was not uniform, but that each case should be examined as it occurred; that the respondents had not knowingly erred; and that the motion ought to be dismissed, with costs.—*Metropolitan Music Hall Co. v. Lake*, High Court, Ch. Div., 1 Mar. 1889.

COMPANY.—*Winding up—Companies Act, 1862, sec. 87.—Foreign action—Stay of proceedings.*—The official liquidator of a company moved to restrain one of the vendors of the company (a British subject) from taking proceedings in the Court of North Carolina against the company, to recover purchase-money alleged to be due to him. *Held* (by Mr. Justice Chitty), that the language of sec. 87 was general, and that there were no words which restricted the proceedings therein referred to to any local limits; that the only point was whether the Court could grant an injunction which could be effectual; that the creditor here was within the jurisdiction of the Court; and that therefore the injunction ought to be granted,—but, as reasons why respondent might subsequently obtain leave to proceed might emerge on evidence, the injunction ought to be only until further order.—*Re North Carolina Estate Co.*, High Court, Ch. Div., 1 Mar. 1889.

COMPENSATION FOR DAMAGES.—*Reservation of mines and minerals—Alluvial clay.*—The predecessor in title of the plaintiff conveyed certain lands to L. T. in fee-simple, under reservation of "all mines of coal, culm, and iron, and all other mines and minerals whatsoever, except stone quarries, within or under" the lands. The defendants, the Sanitary Authority of the district, constructed (under their powers) a drain at a depth of 6 feet across the land for a distance of 600 yards. They had compensated L. T.'s successor in title; plaintiff now claimed compensation for the damage to the minerals reserved to him. The land was contiguous to a river, and had been, by overflows of the river, covered with alluvial clay, which varied in depth from 6 to 30 feet, and was of value for the purpose of making bricks, etc. The clay came right up to the surface, and defendants contended that it formed the actual surface of the soil, and was not included in the reservation. Under the 38th section of Public Health Act, the arbitrator awarded compensation, and Mr. Justice Day gave judgment for the plaintiff. *Held*, that the clay fell clearly within the word minerals, and was reserved to the plaintiff.—*Earl of Jersey v. Neath Poor Law Guardians*, Ct. of App., 5 Mar. 1889.

EASEMENT.—*Light—Prescription—Interruption of temporary character—Onus of proof—Act, 2 and 3 Will. IV. c. 7, secs. 3, 4.*—In an action

brought to restrain defendant from building so as to obstruct the access of light to plaintiff's house, defendant alleged that plaintiff had not had twenty years' uninterrupted enjoyment, inasmuch as he (defendant) had been in the habit of piling up in his back-yard (in which he was now proposing to build) packing-cases, which were moved from time to time, so as to prevent plaintiff from acquiring the right to light. *Held* (reversing North, J.), that no interruption for a year had been proved; and that where alleged interruption of light was in its nature temporary and fluctuating, the onus was on the party alleging interruption to show that it had continued for a year.—*Presland v. Bingham*, Ct. of App., 5 Mar. 1889.

COMPANY.—*Security for costs—Foreigner residing in Scotland—Power to enforce order in Scotland.*—F., a domiciled foreigner residing in Scotland, brought an action in the Queen's Bench Division against a company, and upon an order being made to wind up the company, the action was transferred to the Chancery Division, and the proceedings in the action were stayed. In a question whether he ought to be ordered to give security for costs,—*Held*, by Mr. Justice North, that the combined effect of the Judgments Extension Act, 1868, and sec. 76 of the Judicature Act, 1873, was to make a judgment of any division of the High Court enforceable in Scotland and Ireland; and therefore in an action by the claimant in the Chancery Division, security for costs would not have been ordered; but an order upon a claim in the winding up of a company was not a "judgment" enforceable in Scotland under those Acts; and that security must be given.—*Re Howe Machine Co.*, High Court, Ch. Div., 8 Mar. 1889.

TRADE NAME.—*Use of similar name—Fraud—Injunction.*—Plaintiffs, a limited company, with registered name of "Thomas Turton & Sons (Limited)," had purchased and carried on an old-established business of steel manufacturers in Sheffield, which had for many years previously been carried on under the firm of "Thomas Turton & Sons." Defendant, who was named John Turton, had for many years carried on a similar business in Sheffield under the firm of "John Turton & Co." In June 1888 he took his sons into partnership, and adopted as the name of the firm "John Turton & Sons." The plaintiff company raised this action to restrain defendant from using the name or any other firm or style so closely resembling plaintiffs name as to be calculated to deceive. Defendant urged that he had acted in *bona fide*, and that the name was the natural and accurate description of his firm. *Held*, by Mr. Justice North, that plaintiffs were entitled to the injunction, as laid down in *Hendriks v. Montagu* (17 Ch. D. 638); even though there is no intention to deceive, it is sufficient that the name is calculated to deceive.—*Turton v. Turton*, High Court, Ch. Div., 12 Mar. 1889.

Sheriff Court Reports.

SHERIFF COURT OF INVERNESS-SHIRE.

Sheriff-Substitute BLAIR.

LOVAT v. FRASER.¹

Crofters' Holdings Act, 1886—Arrears—Cancellation—Draw-back of fair rent.—A crofter was in arrear when he applied to the Commissioners to fix a fair rent, and between that date and the date of the Commissioners' determination he made certain payments of rent. One of these payments was made before any more rent had accrued beyond the arrears due at the date of the application, and the whole payments were less than the amount of the arrears due when the application was made. The Commissioners cancelled the arrears outstanding when they disposed of the case, and reduced the rent. *Held*, that the crofter was entitled to deduct from the next term's payment of rent, after the decision of the Commissioners, the excess of the aggregate of these payments over the aggregate of the amount of fair rent for the period.

Section 6 (2) of the Crofters Act of 1886, as amended by section 4 of the Act of 1887, provides: "Where the Crofters Commission shall fix a fair rent which shall be less in amount than the present rent, the crofter shall be entitled at the next payment of rent to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent, in respect of the period between the date of the notice of application to fix the fair rent and the first term of Whitsunday or Martinmas next following the date when such rent was fixed."

The pursuer, Lord Lovat, sued the defender, Hugh Fraser, crofter, Reelig, for the sum of £4 in name of rent due at Whitsunday 1888. The Sheriff assolizied the defender. In his note the Sheriff said:—

"The defender is a crofter within the meaning of the Crofters' Holdings (Scotland) Act, 1886, and on the 12th November 1886 presented to the Commissioners an application to fix a fair rent, and notice of this application was given to the pursuer. At that date the rent payable by the defender was £8 a year, and the arrears amounted to £13, 17s. 4d.; but, on the 20th December following, the defender paid to account thereof £9, and on the 25th July 1887 he paid a further sum of £4. No rent has been paid since. The arrears of rent as at 11th November 1887 were £8, 17s. 4d. On 12th April 1888 the Commissioners fixed the fair rent at £3, 10s. a year, and cancelled the whole arrears then due. The rent payable at the term of Whitsunday 1888, in terms of sub-section 2 of section 6 of the Crofters Act, 1886, is the old rent—namely, £4 for the half-year ending at that term. The defender, however, contends that under sub-section 3 of section 6, he is entitled to deduct from that rent the sums he has paid over

¹ We notice this case elsewhere.

and above the £3, 10s. fixed by the Commission as the fair annual rent of his holding, in respect of the period between the date of the notice of his application and the said term of Whitsunday, because the fair rent fixed by the Commission is less than the rent which he formerly paid. The pursuer, on the other hand, contends that the defender must pay the old rent at the term of Whitsunday 1888, and that he is not entitled to any deduction in respect that the Commissioners, having taken into account all the circumstances which have led to the arrears, decided that no part of these arrears should be paid. On the part of those crofters who applied to the Commissioners, there would naturally be a tendency to refrain from paying their rents, and thus to accumulate arrears. But with a view to counteract that tendency, and to encourage the crofters to pay their rents during the period between the date of notice of their application and the date when the fair rent should be fixed, sub-section 3 was introduced into the Act, entitling them to certain deductions in case the fair rent fixed by the Commissioners was less than the rent the crofter had previously paid. This, too, quite independently of the powers granted to the Commissioners of dealing with the arrears upon any holding. It lays down a general rule in plain terms, that the crofter shall be entitled in such a case to deduct from the amount of fixed rent such sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of notice of application, and the first term of Whitsunday or Martinmas next following the date when such rent was fixed. It entitles the crofter who has paid rent after notice of application, to deduct all over-payments he may have made in excess of the fair rent, and forms an exception to the provision in sub-section 2. This I take to be the true purpose and meaning of the sub-section 3, and, using the words of that sub-section according to their fair and ordinary import and understanding, I think they apply to the case of the defender, who has continued to pay the old rent notwithstanding his application to the Commission. The rent fixed in respect of the period between 12th November 1886, the date of notice of application, and Whitsunday 1888, the first term following the date when such rent was fixed, amounted to £5, 5s., and the defender has paid to the pursuer since 12th November 1886 the sum of £13—that is, a sum equivalent to three half-years' rent at the old rent, and £1 more. Or, take another view, the arrears at 11th November 1886 were £13, 7s. 4d. The rent at the rate fixed by the Commission for the period from 11th November 1886 to 11th November 1887 is £3, 10s.—total, £17, 7s. 4d. But since 11th November 1886 the defender has paid £13, which the Commission has cancelled of arrears, £8, 17s. 4d., making a total of £21, 17s. 4d. The balance of £4, 10s. represents the over-payments made by the defender. In either case the over-payments made by the defender exceeds the sum now sued for, and therefore he is entitled to absolver.

All communications for the Editors to be addressed to the care of the publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE

Editorial.

Trust Investments.—The Bill of Mr. Cosens Hardy, at present before Parliament, proposes to assimilate the power of investment possessed by trustees in England to those enjoyed in Scotland under recent legislation. The Government appear to look with some suspicion upon the measure, which would, no doubt, have a tendency to lower the price of consols, and diminish the borrowing powers of the State. We observe that heritable securities in England, Wales, and Ireland are allowed, but Scotland is excluded. It was hardly, indeed, to be expected that Parliament would sanction the investment of English trust funds in real security in this remote and semi-barbarous corner of the globe.

* * *

Female County Councillors.—The Court of Queen's Bench has decided, in the case of *Beresford Hope v. Lady Sandhurst*, April 13, 1889, that a woman is not eligible to sit upon a County Council under the Local Government Act of last year. The joint opinion of Baron Huddleston and Mr. Justice Stephen goes into an elaborate analysis of the statutes bearing directly or indirectly upon the matter, only to reach the result that the reading of the statutes is ambiguous. This conclusion opens up a short cut to the disposal of the case. An arrangement, contrary to all the traditions of municipal institutions in the country, is not to be inferred from the

anxious collation of a number of ambiguous statutory provisions. If Parliament had meant women to sit in County Councils, Parliament would have expressly said so, or at all events ought to have done so. There can be little doubt that the decision will commend itself as a sound one to most lawyers ; but, doubtless, the ladies will not be disposed to let matters rest there.



Sale of Imported Game in Close Time.—In the case of *Guyer v. The Crown*, April 13, 1889, the Court of Queen's Bench have held that a statutory provision against the sale of game during close time does not apply to imported game. In the case in question, a game-dealer was convicted of having partridges in his possession during close time, but the partridges had been imported from Russia, and in these circumstances the Court of Queen's Bench, by a majority, quashed the conviction. On the face of it, nothing could appear more reasonable than that the law should limit its protection to British game. But, on the other hand, it has been strongly urged that to permit the sale of imported game is to render the statutes nugatory, even for the protection of British game, as foreign birds are indistinguishable from those reared in this country. The Court of Queen's Bench were careful to guard against such a contingency, by expressly laying down that the *onus* will always be upon the game-dealer to prove that the birds were imported when he takes this plea. Mr. Justice Manisty, who dissented, ridiculed the opinion of the majority, the Lord Chief-Justice and Mr. Justice Hawkins, a course which the Chief-Justice ventured to characterise as "inconvenient." It is to be hoped that the decision will not have the effect of exposing our sorely tried game stock to new perils. It would be sad if the partridge were to share the fate which has befallen the hare.



The Removal of Judges.—The *American Law Review* comments upon the authority exercised by Presidents of the United States to remove State or territorial judges. This power, it appears, has been exercised by every President since

Polk, and the action of successive Presidents has been supported by the Senate. Nevertheless, the *Law Review* holds that the removal of a territorial judge is unconstitutional and illegal, and that the President has no more power to remove a territorial judge than he has to remove a Justice of the Supreme Court of the United States. "It is a shame that, without the least shadow of warrant in law, Presidents of the United States assume a power which no Government in England has dared to assume for more than 200 years. It is a shame that the Senate upholds the exercise of such a power. It is a shame that public opinion is so ignorant as to overlook such offences against the fundamental principle of free government. It is in the highest degree important that everywhere judges should hold their offices by a fixed and certain tenure. But under the present system the territorial judges are the mere puppets of the Federal Executive, and in many cases their Courts are notoriously the centre of corrupt intrigues and cabals."

* *

Cattle Horning.—In the case of *Ford v. Wiley*, the Court of Queen's Bench (Coleridge, C. J., and Hawkins, J.) have tentatively held that this abominable practice is illegal. They indicated that this was their finding; but as the matter had been decided otherwise, both in Scotland and in Ireland, they deemed it respectful to the judges who had decided these cases that they should deliver a considered judgment, and accordingly they allowed the case to stand over until after the vacation. At the same time they promised to consider a suggestion made from the Bar, that the case should be argued before the Court. The Scots case referred to was that of *Renton v. Wilson*, 15 R. (Just.) 84, in which the Court of Justiciary held that as horning was practised *bonâ fide* over a considerable district of the country for a legitimate purpose, it was not cruelty within the meaning of the statute. We never approved of that judgment. The Court declined to inquire whether the operation was necessary or beneficial, but in our opinion they were bound to do so. We think that the evidence in that case showed that the operation was unnecessary, and was wantonly cruel. It will be time

enough, however, to discuss the legal aspects of the case when the considered judgment of the Court of Queen's Bench is pronounced.

* * *

The Local Government Scheme.—Upon 8th April the Lord Advocate submitted to the House of Commons four important Bills, which embody one general scheme for the reorganization of Local Government in Scotland. Articles will be found elsewhere upon some of the leading features of the measures. The plan contained two surprises: (1) the inclusion of a proposal for the substitution of local enquiries before a Commission for enquiries before Parliamentary Committees in London; and (2) the proposed application of a considerable proportion of the probate duty towards the abolition of school fees in the compulsory standards in elementary schools. It is fortunate that both the surprises were agreeable ones; indeed, they constitute the most popular features in a scheme which seems to command a singular consensus of approval from men of all shades of political opinion. The County Government Scheme has been embodied in two separate Bills, the purpose being apparently to include all matter of principle which may give rise to serious division and party feeling in one Bill, and to lighten the load by embodying all matters of mere machinery and detail in another Bill, which it is trusted may be allowed to pass without any lengthened discussion.

Special Articles.

SCOTTISH LOCAL GOVERNMENT REFORM.

THE Ministerial proposals for the reform of local government in Scotland have now been before the House of Commons and the country for some weeks. Parliament has still to give its maturer opinion on them. But the country at large has already clearly expressed its opinion of the measures; and that opinion—like the *ex tempore* indication of view given in the House of Commons on the conclusion of the Lord

Advocate's singularly lucid exposition of the Bills—has been all but entirely favourable. Reformers were indeed hard to please had the reception of the measures been otherwise. They are comprehensive and thorough; yet they so far preserve the spirit of the old system (which worked so well) that grumblers from any quarter have been few, and these less than half-hearted in their grumbling, while more than half-hearted in their satisfaction.

With the "Private Bill Procedure (Scotland) Bill" we deal elsewhere. The remainder of the scheme—that referring to local government in the strict sense—is embodied in three Bills, viz. "The Local Government (Scotland) Bill," "The Local Government (Scotland) Supplementary Provisions Bill," and "The Parochial Boards (Scotland) Bill." These measures do not attempt to do everything. Their joint result is not a theoretically perfect and symmetrical system of local administration. It comes far short of that. Several anomalies will still remain, for all the authorities at present administering local affairs are not yet to be merged into one in which all powers and duties within the area shall be concentrated. In their own direction, the proposals are not final. Subsequent legislation must come to complete them, though that need not be for many a day. Meanwhile, the measures go far in the right direction. They give us an excellent working system. For practical purposes the number of Boards has been diminished, and the somewhat scattered functions of local government have been gathered largely into one authority. The two prominent omissions are the administration of education and the control of the liquor traffic. That the Government would not attempt to embrace these two departments in their scheme was anticipated, and consequently their omission now has not caused much comment. Good reasons probably exist for such a course—reasons of a Parliamentary nature. From the standpoint of completeness, however, it is to be regretted that both could not be included in the present Bills.

The outstanding feature of the scheme is the establishment of a local body, which shall be chosen by popular election. To this Board shall be transferred the powers and duties of the various existing authorities. The election is to be on

a broad and popular basis. By section 31 of the substantive measure, all qualified ratepayers shall have the right to vote, and this shall include qualified Peers, also "every woman who is not married and living in family with her husband, otherwise possessing the qualification for being registered as a Parliamentary elector;" and "every service franchise occupier possessing the qualifications for being registered as a Parliamentary elector, shall be entitled to vote if he has claimed to be *rated* under the provisions" of the Bill. The area of administration is to be the county. Royal and Parliamentary burghs are not dealt with, except as regards the affairs of Police and the Contagious Diseases (Animals) Acts, in burghs of less than 7000 inhabitants. Subject to similar modifications, police burghs are also left autonomous. A County Council . . . shall be established in every county. (Section 4)—It is to consist of a chairman (who shall be called the Convener of the County), and of Councillors. The Councillors must be qualified as electors in their county, and the number of them to be elected in any county is to be determined by the Secretary for Scotland. For the purposes of election, a county is to be divided into electoral divisions, these divisions to consist of parishes, parts of parishes, or groups of parishes, and police burghs or parts of police burghs. Only one Councillor is to be elected for each electoral division. The Councillors will hold office for three years. The composition of this Board leaves nothing to be desired. Theoretically it ought to prove a most serviceable body. It rests with the electors to make it so in practice. There is abundance of material in the various counties from which to constitute a Council of experienced local administrators. Let us now see what are to be the functions of the Council.

To this body shall be transferred (1) the whole powers and duties of the *Commissioners of Supply*, except police administration, and the authorizing, etc., of works involving capital expenditure, and also the borrowing of money;—these two latter powers being entrusted to a joint committee of seven County Councillors and seven Commissioners of Supply, presided over by the Sheriff of the county; (2) the whole powers and duties of the *County Road Trustees*; (3) the whole powers and duties of the *Local Authority* of the county

under the Contagious Diseases (Animals) Act; (4) the whole powers and duties of the *Parochial Boards as Local Authorities* under the Public Health Acts; and (5) the administrative powers and duties of the *Justices of the Peace* of the county in general, or special, or Quarter Sessions assembled, in respect of—(a) the execution as Local Authority of the Acts relating to gas-meters, to explosive substances, to habitual drunkards, and to wild birds; (b) the appointment of visitors to asylums; and (c) the registration of rules of scientific societies [section 11]. There is also (by section 15) a power to the Secretary for Scotland to make from time to time a Provisional Order transferring to the County Councils any such powers and duties of the Privy Council, the Secretary for Scotland, the Board of Trade, or the Scottish Education Department, or other Government department, as are conferred by statute, “and appear to relate to matters arising within the county, and to be of an administrative character;” and also any such powers and duties arising within the county of any public body, whether corporate or incorporate (not being the corporation of a burgh, or a parochial board, or a school board), as are conferred by any statute.

These are very wide powers. The new elective Council thus supersedes the bulk of the existing bodies in counties. The School Board alone remains untouched, with its powers fully preserved to it. All the other Boards contribute, in greater or less proportion, to the powers of the new Council. The Road Trustees and the Local Authority surrender their all, and pass away. The Justices of the Peace fare much better—for the present. They part with only their minor powers—as yet, retaining their judicial functions intact, and also their important administrative powers in the control of the liquor traffic. The Parochial Boards lose—we should imagine, with universal approval—their powers as Local Authorities under the Public Health Acts. This is, of all others, probably the most urgently required reform in the whole scheme. The present area of administration and the electoral area of the administering Board are alike unsuited to the effectual carrying out of these most important enactments, and the transference of these powers and duties to this more widely representative body will be welcomed by all who have an acquaintance with

the working of these Acts. The Parochial Boards retain their Poor Law functions. By the third of the Bills with which we are dealing, however, viz. "The Parochial Boards (Scotland) Bill," the composition and size of the Boards are materially changed. Henceforward a Board is to consist of a chairman and of Parish Councillors, whose number is to be determined from time to time by the Board of Supervision, one half to be elected by the owners and one half by the occupiers, on a Parish Council Register. The Commissioners of Supply, as such, are stripped of all their powers. They continue to exist; and the power left them as a body is that (under 19 and 20 Vict. c. 93, §§ 5 and 6) of adjudicating upon all claims for admission to their own body—subject, of course, to appeal to the Court of Session. A somewhat barren privilege this, if other powers do not remain behind! And there are, practically, none. The Commissioners will continue, then, to exist, but solely for the purpose of furnishing their contingent of seven members to the composite Committee which is to be charged with the administration of Police, and the matter of works involving capital expenditure.

Such are the cardinal proposals of the Ministerial scheme. These are the provisions for the consolidating of authorities, for the concentration of powers, and for making administrative areas more nearly coincide. Reform, therefore, and not extension of local government in Scotland, is the purpose of the measures. No new powers are delegated from a more central authority by direct provision of the Bills. The power, however, which is given by section 15 to the Secretary for Scotland, to transfer from time to time, by Provisional Order, to County Councils, certain powers and duties of the Privy Council and Government Departments, may open the door for the delegation of *administrative* work not hitherto carried out by the Local Boards. But the purpose and effect of the Bills are to improve the working capacity of the machinery which is to deal with the present material.

The substantive Bill and the supplemental Bill contain details for the work of transferring powers from the old authorities to the new—a matter of some intricacy, involving the continuance and repeal of statutes, and the provisions necessary to avoid any stoppage of the management of affairs

They provide, too, for several leading arrangements in the manner of carrying on the work of the new Councils. Thus, Committees are to be appointed for the special departments. For the purposes of managing the Roads and Bridges Act, the Council are annually to appoint from among their own number a Committee of not more than thirty, to be called the County Road Board, and the county is to be divided into districts (sect. 16, *b* and *c*). Similarly, for the purposes of administering the Public Health Acts, the county is to be divided into districts, and there is to be a District Public Health Committee for each such district (sect. 17, (1.)).

PRIVATE BILL LEGISLATION.

No part of the Government Local Government Scheme has given more widespread satisfaction throughout Scotland than the Bill which proposes to create a local tribunal for the conduct of Private Bill Enquiries. The only discordant note in the general consensus of approval comes from the enlightened circle of wise men in the West, who alone amongst the people of Scotland have been able to dispel from their minds the ancient fallacy, fostered by apocryphal history and erroneous geography, that Edinburgh is the capital of Scotland. As the Court of Enquiry is to be a peripatetic one, and is to sit wherever will best suit the convenience of parties, the fears of these gentlemen lest the new departure will tend to perpetuate the anachronism of which they complain seem hardly reasonable. The threatened opposition in that quarter, however, is scarcely worth considering, as the Bill will undoubtedly become law this year, unless the business of Parliament is interrupted in some quite unforeseen fashion.

The details of the scheme require consideration, and it is to be trusted that general zeal for the measure will not prevent an effort being made to render it as thorough and perfect as possible. Two objections present themselves somewhat strongly. Any measure may be withheld from the purview of the Commission, and be referred to a Parliamentary Committee, as at present, on account either of its magnitude or of its not affecting Scotland only. The decision in this matter

is left to the Chairman of Committees in the House before which the Bill is in dependence. We disapprove of this, and think that the measure should go to the Commission, unless the House of Parliament to which it is first presented orders otherwise. The Chairman of Committees will naturally be disposed to magnify his own office, and to favour the system of enquiry with which he is most familiar. A Chairman like the late Lord Redesdale would never have sent a Bill to the Local Commission. Nor do we approve of the first exception, viz. the magnitude of the measure. In fact, the magnitude of the measure would appear to us to be an additional reason for sending a Bill to the Commission rather than to a tribunal so anomalous, unbusiness-like, and unsatisfactory as Parliamentary Committees have proved themselves to be in recent Scottish inquiries.

Another objection is to the constitution of the Commission. One of the Commissioners is to be a judge of the Court of Session. The other two are to be selected by the Lord President from a panel of five, made up by the judges of the Court of Session. This appears to us to be a cumbrous and anomalous arrangement, and to be open to very serious objection. It is a novelty in Scotland to give valuable patronage to the judges of the Court of Session, and so to expose the judicial bench to the influence of wire-pulling and the imputation of favouritism. We see no valid reason why these Commissioners, like other public servants on temporary employment,—such, for example, as the Crofters Commission,—should not be appointed by the Secretary for Scotland. Moreover, if the judges are to select at all, we think that it would have been better to have left the choice entirely in their hands. The duty conferred upon the Lord President of selecting two from a panel of five eminent men, all duly qualified, and all no doubt covetous of the preferment, will be an invidious and anxious one. If it were intended to make the Commission somewhat more of a representative body than one nominated in the usual way by the Crown, this might have been effected by giving one nomination to a Committee (like the Committee of Selection) in each House of Parliament.

We observe that Parliamentary agents of more than two

years' standing at the date of the passing of the Bill are to be allowed to practise before the Commission. This is a reasonable concession to the vested interests which have so long delayed Parliamentary action in this matter. We are doubtful, however, if the proviso will help these interests much. If Parliamentary Committees were to sit in Scotland, the experience of these gentlemen before such tribunals would no doubt stand them in good stead. But we doubt if many Scottish promoters of Bills, or of opposition to Bills, will prefer the assistance of a London Parliamentary agent to that of a Scottish solicitor or advocate before a tribunal presided over by a Scottish judge.

There can be no doubt that the grievance of having to go up to London for all private Bills is one which has laid a strong hold upon the imagination of the Scottish people. Political speakers tell us that nothing so readily rouses the enthusiasm even of country bumpkins, who never had, or never will have, the remotest personal interest in a private Bill, as the denunciation of this anomaly and the demand or assurance that it shall be remedied. Material interest is no gauge of sentimental interest. Nobody grumbles so bitterly against the allowance to the Royal family as the man who pays no direct and hardly any indirect taxes. In the present case it is fortunate that the sentimental interest of the people, the political interest of the Government, and the material interest of the legal profession, have all conspired together, and the result is the Bill which is now before Parliament.

THE OREGONIAN RAILWAY DECISION.

THE Oregonian Railway Company is a Scottish corporation formed under the Companies Acts for a number of purposes, amongst which are expressly included in the Memorandum of Association not only the building, but the letting of the railroad therein referred to. In 1881 the Company were constructing a railway in the State of Oregon, when the Oregon Railway and Navigation Company offered to take a lease of the line. The offer was accepted; the Scottish Company abandoned the further construction of the line, and

the part constructed was handed over to the lessee. The American Company which thus became lessee is a corporation formed for a variety of purposes, one of which is the leasing of any railroad or railroads in the State of Oregon.

The lessees took possession in accordance with the bargain, and for three years the rent was paid without demur. But in May 1884 the lessees suddenly repudiated the lease, and offered to hand over the railroad, a great part of which had been allowed to become dilapidated, to the lessors. Thereupon an action for rent was at once begun at the instance of the Scottish Company. The case was heard in a Circuit Court of the United States in Oregon. In March 1885 the case was disposed of by this Court, which consists of one district judge and one United States judge. The Court were of opinion that the defences were frivolous, and judgment was entered for the plaintiffs.

Against this judgment an appeal was taken to the Supreme Court of the United States at Washington. The case was not heard until May 1888, and judgment was not pronounced until 5th March 1889. Strong representations were made to the Court of the enormous inconvenience occasioned by this delay, but they declined in any way to accelerate the case, and indeed the delay in pronouncing judgment after the case was heard out was quite exceptional. The judgment of the Court was to the effect that the lease was void. Mr. Justice Field dissented, and it is worthy of note that he is the judge assigned to the judicial district of which Oregon forms a part. Accordingly, all the judges who have any direct share in the administration of Oregonian law were in favour of upholding the lease.

The question before the Court was whether the granting or the taking of a lease of a railroad was *ultra vires* of the contracting corporations, and the Court held that, whilst the Scottish Company had no power to grant, the American Company had no power to take, a lease of a railroad. As both Companies have the required power expressly embodied in their respective constitutions, the decision seems an astounding one, and it is therefore with some curiosity that one examines the grounds upon which it proceeds. The decision professes to be based upon the doctrine, that a corporation has

no powers other than those conferred upon it by the State which calls it into being. A company which is chartered by the State for a special purpose, as, for example, to construct a railway or a canal, has no power to hire or to let a railroad or canal, and still less to start a manufactory or work a telephone system. Now, in most American States corporations are formed under special Acts, and it is to the special Act that one turns to ascertain the purposes for which the company is incorporated and its consequent powers. But in Oregon the constitution prohibits the incorporation of companies under special Acts. There is, however, a general Act under which corporations may be formed. This general Act provides that any lawful purpose mentioned in the articles of incorporation shall be within the powers of the corporation. Now, the Oregon Railway and Navigation Company was formed under this Act, and its articles of incorporation contained an express power to take a lease of a railroad. Accordingly, the only question which remains is whether the taking of a lease of a railroad is a lawful purpose.

Now, the Supreme Court do not in terms answer the last question; but their decision is explicable in no other view than that they hold that the leasing of a railway by a company, one of the purposes of which is to construct a railroad, is an unlawful purpose. They reach this result in this way, that they hold that a railroad company, a company one of the purposes of which is to construct a railroad, is a railroad company pure and simple, and is not entitled to take a lease of a railroad, although this power is expressly embodied in the articles of incorporation. It would almost appear, from the terms of the opinion, that the Court regard the leasing of a railroad as something peculiarly anomalous, and indeed obnoxious, for they evade, and indeed seem to deprecate, what would appear to be the logical result of their judgment, that it is impossible in Oregon legally to combine any other purpose with that of the construction of a railroad. The company in question have power to run steamers, and in fact do so. Is this illegal? Certainly it appears much further away from the business of a railroad company than the leasing of a line.

In regard to the Scottish Company, this company came to Oregon under a law which purported to give to foreign

corporations the same rights, powers, and privileges as domestic corporations enjoy. The Supreme Court of the United States refuse to give effect to the plain intendment of the law, and by putting a very strained interpretation upon it, they arrive at the result that, even if the American Company had power to lease, the Scottish Company had none to let. Here, again, the Court seemed to have been influenced by the consideration that "whatever may have been the intent in the minds of the legislators," the letting of a railroad was a step so extraordinary that any construction was to be preferred to one which would have the effect of conferring such a power.

To a lawyer on this side of the Atlantic the decision and the reasoning upon which it proceeds are alike preposterous and incapable of even a stateable defence. The judgment comes as a painful shock to those in this country who regard the Supreme Court of the United States as a powerful and impartial tribunal. It is lamentable that judges professing to administer a civilized system of jurisprudence should have pronounced so outrageous a decision, and that the Supreme Court of a great country should have given judicial sanction to such a disgraceful swindle.

COUNSEL AND AGENTS IN BELGIUM.

IN the little kingdom of Belgium, as in our island, the fusion of the profession is a *quaestio vexata*, which has for some time agitated the legal world. At present the winds of controversy are fortunately hushed, both here and in England, though whether the lull is to be more than temporary may be matter of doubt. But whatever be the force of the arguments in favour of fusion here, the state of the profession in Belgium gives to the advocates of change a justification which in this country they happily lack, and seems to render the expediency of reform there more obvious, at all events, than it has yet appeared to be here.

In Belgium, as with us, contentious legal work is transacted by two classes of practitioners, the *avocats* and the *avoués*—words which may be roughly translated "counsel" and

"agents," though such a translation conveys to our understanding a very imperfect notion of the duties they respectively perform.¹ The *avocats*, for instance, do not, as with us, confine themselves mainly to the superior Courts, but practise in all of them indifferently, and the same training is required whether they elect to plead before the supreme Court of the kingdom or before the humblest *juge de paix*. The *avoués*, on the other hand, only practise before certain of the Courts, and even in these Courts their services may in many actions be dispensed with.

In order to qualify for the Bar, the candidate must first obtain the degree of Doctor of Law (*docteur en droit*) at a university, and thereafter all that is necessary to entitle him to design himself "*avocat*" is that he take before one of the Courts the oath prescribed by law. He cannot, however, be entered upon the list of advocates proper until three years have elapsed, and during this period (in which he is known as a "*stagiaire*") he can undertake no remunerative legal work. He is, nevertheless, allowed to plead, and is frequently employed as junior counsel; he is bound to act, when required, as counsel for the poor, and is expected to be in regular attendance at the Courts in order to acquaint himself with their forms of procedure. At the expiry of the three years he obtains from the disciplinary council of the Bar to which he desires admission a certificate that he has kept himself properly employed during his *stage*, and he may then be inscribed upon the roll, undertake cases upon his own responsibility, and receive fees.

To entitle a man to apply for an appointment as *avoué*, it is necessary that he be twenty-five years of age, that he have served for five years in an *avoué's* office, and have a certificate of morality and capacity from the disciplinary council of the "*Chambre des avoués*" which he means to join. It was formerly necessary that the candidate should have attended a course of law lectures, and particularly a course of lectures upon procedure, at some law school or university, but this is not now required. The number of appointments at

¹ Before the French Revolution, the *avoué* was generally designated *procureur*. The word *avoué*, in its more special signification, was applied to the procurators for the Church and the religious communities, and it passed successively through the forms: *advoc*, *avoier*, *avoc*, *advoué*, *avoué*.

each Court is limited, and vacancies as they occur are filled up by Government upon the nomination of the Courts at which they exist.

The statutory privileges of the *avoué* are the right to "*représenter la partie*," to "*postuler*," and to "*conclure*" before the tribunals of first instance and the Courts of Appeal. In virtue of the first of these prerogatives, the *avoué* takes the place of the litigant before the Court; everything done by him is considered the act of the litigant, while every step taken against him is as effectual as if taken against the party. The right to "*postuler*" entitles the *avoué* to prepare the pleadings and to present them to the Court, while the right to "*conclure*" gives him the privilege of preparing and presenting the important *conclusions* to which the Court is asked to give effect. These contain a summary of the facts which the party wishes to establish, or of the law which he seeks to maintain, and the Court cannot go beyond them without judging *ultra petita*. The right of the *avocat*, on the other hand, is, strictly speaking, merely the right to plead (*plaider*), that is, to present, orally or by writing, the development of the *avoué's* conclusions.

The Belgian *avoué*, however, has come, so far as his statutory privileges are concerned, to be a mere tool in the hands of the *avocat*. The latter directs the whole process, chooses the *avoué*, and sends him his papers, with the conclusions prepared and ready for his signature, while the litigant frequently does not know who his *avoué* is, and communicates in all matters directly with the *avocat*. It is curious that in France, from which Belgium has derived most of her laws and legal usages, the relations between the *avocat* and the *avoué* are quite different. There they correspond almost exactly in character to those between counsel and agent as understood in this country. Communications between the *avocat* and the clients are made through the *avoué*; the latter in general selects the *avocat*, and sends him his papers and fees, while the *avocat* is rigorously confined to consultation and pleading.

In various classes of action, according to the present law of Belgium, it is unnecessary to employ *avoués*. They are not required in the Courts of Assize nor in the *tribunaux correctionnels* (inferior criminal Courts). Neither are they

necessary in cases which come before the *juges de paix* (petty civil judges) nor before the *tribunaux de commerce*. These latter Courts (which are composed of lay judges, and dispose of mercantile cases) are only established in the more important trading centres, and where they do not exist their functions are competently discharged by the ordinary tribunals. In such circumstances the ordinary Court of first instance deals with the case in accordance with the regulations governing the procedure in the Commercial Courts, and the *avoués* who are in use to practise before it in ordinary cases are excluded. Should its judgment, however, or the judgment of a proper Commercial Court, be brought under the review of a Court of Appeal, *avoués* must be taken in though the services they render are purely formal. In cases brought under the fiscal and electoral laws, they need not be employed, in whatever Court the action be brought.

On the other hand, the *avoué* has acquired considerable privileges which infringe more or less upon the proper domain of the Bar. He can plead concurrently with the *avocat* in certain criminal cases; and those *avoués* who are attached to tribunals of first instance, in places which are not head towns of provinces, or where there is no sitting of a Court of Assize, may plead in all cases in which they get their clients' authority to do so. Seventeen out of twenty-six tribunals in Belgium are in this position, and as the *avoué* there has a great advantage over the *avocat*, and the appointments are political, there is frequently unseemly struggling and intriguing when vacancies occur. Before the other Courts of the country, the *avoués* may plead in all applications incidental to the principal action, which can be disposed of summarily, and also in all matters of procedure; and in the absence of the *avocat*, or on his refusal to plead, the *avoué* may be authorized by the Court to speak upon the merits.

All other work incidental to a process may be done either by the *avocat* or by the *avoue* indifferently. Both have offices (when the state of their practice makes it necessary), and employ clerks for copying purposes; both precognosce and cite witnesses, instruct officers, and pay judicial and other fees. Some of the more distinguished counsel, however, confine themselves entirely to pleading, and employ an *avoué*

to do all other necessary work. So far as outward appearance in Court goes, the *avocat* is almost indistinguishable from the *avoué*. Both wear long black gowns, meeting in front, and covering the whole person, and of almost identical cut, white bands, and high velvet caps, which are removed by the wearer when pleading. Wigs are not worn.

It is not easy to predict what may be the future of the *avoué*. The question of their suppression was discussed in connection with the labours of the Commission appointed some years ago to revise the Procedure Code, and this Commission reported in favour of their abolition. The proposal, however, met with considerable opposition, though even the *avoué* admitted that the existing condition of matters was in many respects unfair and anomalous, and led to much unnecessary expense. The Courts were asked to report upon the matter, and finally a debate took place in the *Chambre des Représentants*, in which the motion for their suppression was lost. Since then the question has only cropped up spasmodically and at intervals, and it is not likely again to engage serious attention, until the Legislature takes up in earnest the revision of the codes which was declared to be necessary by the National Congress in 1831, and which still awaits accomplishment.

ELECTRICITY AND THE DEATH PENALTY.

WE have been favoured by Mr. Clark Bell, President of the Medico-Legal Society of New York, with the advance sheets of an article upon this subject, in which he gives an account of the movement in America, and the inquiries which have there been made into the matter.

"There has been," he says, "for more than a quarter of a century in this State a prejudice against the scaffold and the hangman.

"Those who have yielded to the stern exactions of the law, which demands 'a life for a life,' have felt an almost insurmountable repugnance to the rope.

"The bungling of Sheriffs' assistants, the negligent or

ignorant adjustment of the noose, have often caused such revolting scenes at public executions as to fill the beholders with horror, and add to that ever-increasing number, now close to a majority, who demand the entire abolition of the death penalty as a punishment for crime.

"The removal of the scaffold as a factor in the civilization of our century, has engaged the attention of the Medico-Legal Society for many years."

We do not think that the above remarks apply with much truth to the state of feeling in this country. There is much irritation at times at the bungling of hangmen, and there is a party—though not, we think, a growing party—in favour of the abolition of the death penalty; but there is no demand for the substitution of any other form of capital punishment for hanging. That there is an "almost insurmountable repugnance to the rope" on the part of those who are compelled to "yield (in quite another sense than our author) to the stern exaction of the law, which demands 'a life for a life,'" undoubtedly holds good here, and to many this will appear one of the strongest arguments in favour of maintaining the old form of punishment. Mr. Bell then proceeds to give an account of the action of the authorities which led to the new enactment:—

"The Legislature of the State, upon the recommendation of Governor Hill, in his messages of 1885 and 1886, named a Commission to examine the subject and report their conclusions, composed of Hon. Elbridge T. Gerry, a member of the Medico-Legal Society; Mathew Hale, Esq., of the Albany Bar; and Dr. Alfred P. Southwick, of Buffalo.

"On January 17th, 1888, this Committee submitted their report to the Legislature of New York. It is a very exhaustive and elaborate document, and it gives the history of human punishments for crimes in earliest times and in all countries.

"It enumerates and describes thirty-four different methods in which the death penalty has been hitherto inflicted.

"The guillotine is in vogue in nineteen civilized countries, the sword in nineteen, the gallows in three, the axe in one, the cord in one, while executions are public in twenty-nine countries and private in seven.

"The Committee claim and enumerate the following as facts demonstrated by their inquiry :—

"1. That the effort to diminish the increase of crime by the indiscriminate application of capital punishment to various offences involving different grades of moral turpitude, or, in other words, by enlarging the number of capital offences, has proved a failure.

"2. That any undue or peculiar severity in the mode of inflicting the death penalty neither operates to lessen the occurrence of the offence nor to produce a deterrent effect.

"3. That from the long catalogue of various methods of punishment adopted by various nations at different times, only five are now practically resorted to by the civilized world. These five are — (1) the guillotine; (2) the garrote; (3) shooting; (4) the sword; (5) the gallows.

"In recommending a change from the present barbarous and inhuman system of hanging, four substitutes are considered — (1) electricity; (2) prussic acid or other poison; (3) guillotine; (4) garrote.

"This Committee do not seem to have considered the proposal made by Professor Packard of a painless death by inhaling sulphuric oxide gas in a small room in each jail, nor the lethal chamber suggested by Dr. B. Ward Richardson, of London; and they discard the use of the hypodermic injection of prussic acid or other deadly poison, as 'hardly advisable, because against the almost universal protest of the medical profession.'

"Their conclusions are as follows :—

"1. That death produced by a sufficiently powerful electric current is the most rapid and humane produced by any agent at our command.

"2. That resuscitation after the passage of such a current through the body and functional centres of the brain is impossible.

"3. That the apparatus to be used should be managed to permit the current to pass through the centres of function and intelligence in the brain.

"The Commission suggested other considerations of great public interest, which may be stated as propositions :—

"1. That the State, by the present universal sentiment

of mankind, can only justify itself in taking human life as a punishment for violation of laws; inflicting the death penalty, where necessary, for the safety of society, and to deter others from the commission of crime.

"2. That the State has not the right to torture the criminal, nor to inflict any punishment whatever in any vindictive spirit, or by way of retaliation for the crime.

"The Committee submitted a draft of a Bill, and recommend:—

"(a) That executions should be private;

"(b) That the details of the execution should not be furnished to the public press; and

"(c) That the bodies should be delivered to medical schools for dissection in aid of science, or be buried in the prison yard.

"The idea of punishment for crime has coloured all human laws.

"Such legislation has been called *punitiva* for centuries.

"These statutes are denominated *penal* in all the codes.

"It is little more than half-a-century since hanging was the penalty in England for more than one hundred statutory offences, many of which are now regarded as trivial.

"Nearly all of these are abolished; but we still call the measure of punishment *penalties*, and we even say, 'the death penalty' when we discuss it, and use the term '*capital punishment*' for judicial killing.

"The report of the Legislative Commission, considered in its broadest and ablest aspect, outside the abolition of hanging and substituting the electric current, lies in claiming that the universal public judgment and opinion of mankind should be recognised by the law-making power, declaring:—

"That the penalty for the violations of the law in what are called 'capital cases' should not hereafter be regarded or treated as punitive.

"That the State does not claim the right of inflicting any punishment upon the homicide in a vindictive or retaliatory sense, or in any degree or view as 'punitive' or compensatory for the act committed.

"That beyond the protection of society, the rights of men,

and what is called the 'deterrent effect' of human punishment, the State has neither the right nor wish to go."

We are not sure that we follow our learned author here, or the Committee of whose report he so much approves. If he means that we do not execute criminals for their own good, or for the sake of abstract justice, or to feed our revenge, but simply to "deter others in all time coming from the like offence," we do not think that there is any discrepancy between the law-making power and "the universal public judgment and opinion of mankind." Nor do we appreciate the objection to the use of the word punishment or penalty as applied to a capital sentence. We do not inquire too closely into the signification and the Greek root of these two words, but we think that both the words, in accordance with the ordinary meaning attached to them by those who use the English language, are quite appropriately used of capital sentences. In most cases sentences are inflicted upon offenders solely for the sake of their deterrent effect. We sentence a man to the cat or to penal servitude not for his own sake or for the sake of abstract justice, but for the good of society; and if that consideration in the case of hanging renders the word *punish* inappropriate, it does so equally in the case of flogging and imprisonment.

The Legislature consulted the Medico-Legal Society of New York, and that body appointed a Committee, which prepared a report, which was adopted by the Society and transmitted to the Legislature. The leading recommendations in that report were as follows:—

" 4. That hanging should be abolished as cruel and contrary to the public sense of our civilization.

" 5. That as a substitute for the present death penalty we would recommend:—

" (1) Death by the electric current, or—

" (2) Death by hypodermic or other injection of poison, or—

" (3) Death by carbonic oxide gas injected into a small room in each jail, as recommended by Professor John H. Packard (*Medico-Legal Papers*, vol. iii. p. 521), giving our preference to the first, or death by electric current.

" 6. That in our judgment executions should be private, and not public.

" 7. That if it were possible to prevent the publication of details of executions in the public press, it would be a public good.

" 8. That the bodies of criminals should be delivered to the medical schools, after execution, for dissection."

Thereafter the Legislature of New York passed a law, which received the approval of Governor Hill, and of which the following are the most important provisions:—

" § 505. The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

" § 507. It is the duty of the agent and warden to be present at the execution, and to invite the presence, by at least three days' previous notice, of a Justice of the Supreme Court, the District Attorney, and the Sheriff of the county wherein the conviction was had, together with two physicians and twelve reputable citizens of full age, to be selected by said agent and warden. Such agent and warden must, at the request of the criminal, permit such ministers of the gospel, priests, or clergymen of any religious denomination, not exceeding two, to be present at the execution; and, in addition to the persons designated above, he may also appoint seven assistants or deputy-sheriffs who may attend the execution. He shall permit no other person to be present at such execution, except those designated in this section. Immediately after the execution, a *post-mortem* examination of the body of the convict shall be made by the physicians present at the execution, and their report in writing, stating the nature of the examination so made by them, shall be annexed to the certificate hereinafter mentioned, and filed therewith. After such *post-mortem* examination, the body, unless claimed by some relative or relatives of the person so executed, shall be interred in the graveyard or cemetery attached to the prison, with a sufficient quantity of quick-lime to consume such body without delay; and no religious or other services shall be held over the remains after such execution, except within the walls of the prison where said execution took place, and only in the presence of the officers of said prison, the person

conducting said services, and the immediate family and relatives of said deceased prisoner. No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the prison, shall be published in any newspaper. Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanour."

As soon as the law was passed, the indefatigable President of the Medico-Legal Society again addressed himself to the matter:—

"This statute going into effect January 1, 1889, the writer felt it the duty of the body to consider, for the benefit of public officials, 'what was the best method of carrying the same into effect,' and recommended to the Society the appointment of a Committee to consider this subject and report.

"That Committee made a detailed report, which was, after discussion, unanimously adopted by the body."

The report is an elaborate document, and sets forth the results of a number of experiments upon dogs, calves, and a horse. The result at which the Society arrive as to the best means in which to apply the fatal current, is as follows:—

"After mature deliberation we recommend that the death current be administered to the criminal in the following manner:—

"A stout table, covered with rubber cloth and having holes along its borders for binding, or a strong chair, should be procured. The prisoner lying on his back, or sitting, should be firmly bound on this table, or in the chair. One electrode should be so inserted into the table, or into the back of the chair, that it will impinge upon the spine between the shoulders. The head should be secured by means of a sort of helmet fastened to the table or back of the chair, and to this helmet the other pole should be so joined as to press firmly with its end upon the top of the head. We think a chair is preferable to a table. The rheophores can be led off to the dynamo through the floor or to another room, and the instrument for closing the circuit can be attached to the wall.

"The electrodes should be of metal, between one and four

inches in diameter, covered with a thick layer of sponge or chamois skin.

"The poles and the skin and hair at the points of contact should be thoroughly wet with a warm aqueous solution of common salt. The hair should be cut short. Provision should be made for preventing any moisture reaching from one electrode to the other.

"A dynamo capable of generating an electro-motive force of at least 3000 volts should be employed, and a current used with a potential between 1000 and 1500 volts, according to the resistance of the criminal.

"The alternating current should be made use of, with alternations not fewer than 300 per second. Such a current allowed to pass for from fifteen to thirty seconds will insure death."

When one considers that these sentences set forth the means to be employed in deliberately taking a human life, it is hardly possible to imagine anything more gruesome than the scientific precision of the details. The objection that it is dangerous to argue from the effects of electricity upon animals to its action upon man, is met in the report in this wise:—

"If any doubt should exist in the minds of some that electricity would not necessarily be fatal to man, because it has been successfully applied to lower animals, we have but to call attention to the fact that since 1883 some 200 persons have been killed, as we are credibly informed, by the handling of electric lighting wires."

We disapprove of the change which has been effected in the mode of executing the capital sentence by the New York Legislature. That change, and the whole argument upon which it rests, seem based upon the conception that the destruction of life is the object of capital punishment. The matter is treated as though the criminal were a dangerous animal, or a homicidal maniac, or a being smitten with an incurable and contagious malady, whom it was desirable to remove from the world. In such circumstances the arguments in favour of an orderly, painless departure would be irresistible. But capital punishment is a measure of a wholly different character. The object of capital punishment is not

to destroy a noxious life, but to inflict such a punishment as will strike the popular imagination with the greatest terror without exciting such sympathy for the victim as will outweigh popular indignation against his offence. So far from the taking of life being the object aimed at, it is a regrettable circumstance that the destruction of life should be one of the incidents of the punishment. The life is taken only because no punishment which spared the life, and excited no overwhelming pity, would impress the popular mind with an equal sense of terror. Perhaps no other form of death is invested with such a sense of horror and degradation as death by hanging. It is this fact which gives its value to the gallows. In substituting death by electricity for hanging, the effort is made—we do not know whether it be successfully made—to eliminate everything from the severest penalty of the law except the one thing, which, as we have pointed out, is not the real end, but only a regrettable, albeit an inevitable, incident of the punishment—the destruction of the life of the condemned. In examining the proceedings which led to the enactment of the law, it is hard to avoid two conclusions in regard to the authors of this measure.

1. They appear to be at heart opponents of capital punishment, and would gladly see it abolished altogether. If so, we think they are wise in their generation. If executions must be carried out by scientific apparatus, public sentiment will not, we think, endure the maintenance of capital punishment. We have already pointed out how death by electricity secures the maximum of mischief with the minimum of benefit. It is the tremendous responsibility of taking a life, not any repugnance to the manner in which life is taken, that makes people squeamish about capital punishment. If the life is taken by machinery, popular attention will be centred upon the one circumstance that occasions qualms in the public conscience—that human life is irrevocably taken.

2. The authors of this measure seem to regard the condemned as a patient rather than as a miscreant. It is necessary, in the public interest, that the homicide should be not punished—Mr. Clark Bell objects to that word—but rather should have something disagreeable inflicted upon him, which will deter others from doing the like; and law,

sanctioned by public opinion, declares that the something disagreeable must be death. But the death must be made as little unpleasant as possible. When a child has to take a nauseous dose there is no help for it, but the humane man of medicine makes the ordeal as little disagreeable as he can by mixing a syrup with the draught. Even so, if the homicide must be executed, there is no help for it; but the humane medical jurist makes the passage as dignified and comfortable as possible, by killing him instantaneously in his chair by an electric shock. Mr. Clark Bell treats the homicide in the same spirit as he treated the convulsed child (see a case referred to in the article "Murder from the best Motives" in "The Month"). Both are *cases*. The homicide is no more to be execrated for his crime than is the child for its agony—the one has to be slain for the good of society, the other for its own comfort. Let both be disposed of according to the most approved scientific methods. Be it trusted that when the homicide's turn comes, science will prove more unerring than it appears to have been in the case of the child.

Here, in Edinburgh, we read with sad indifference of accidents and catastrophes by land and sea, of cities destroyed by earthquakes and floods, of provinces ravaged by plague and famine. We listen with equanimity to the clash of contending armies. We know that every minute a member of our race passes out into the night; and we study with feeble interest the weekly mortality statistics of our own town, in relation to the weather of the preceding week. But the whole city goes with blanched cheek and bated breath when, as on the other morning, the black flag waving over the Calton prison tells us that on the scaffold the hangman has done his ghastly duty. The gallows and the rope, through long centuries of use, have taken a strong hold of the imagination of the Anglo-Saxon race. "To be hanged by the neck, what a death!" exclaimed a wretched murderess, the other day, as the judge pronounced the terrible sentence. Is not the horror which these words express a most powerful plea for the maintenance of a form of punishment the terror of which is a most formidable preventive against the darkest crime of which humanity is capable?

THE REMNANT OF THE JURY IN SWEDEN.

II.

HAVING fully described the procedure in a Swedish court of law, and contrasted it with that in England, the author proceeds to criticise the merits of the *næmd*.

“From this description of the Swedish *næmd*, your readers must have perceived that it is something very different from an English jury. When it is remembered that the Swedish judge has the power to draw up his decision without the aid of the *næmdemen*, they sitting silently by meanwhile, to read it to them before hearing their opinions, and to endeavour to gain their consent, or the consent of some one of them to it,—a practice which always takes place where the cause has been adjourned prior to the judgment,—it will be obvious that our *næmd* has at the present time nothing in common with an English or American jury. It will be obvious that the *næmd*, whether it may deserve to be called a jury or not, has so small a practical weight in the administration of justice, compared with its nominal position, that it is no injustice to say that it is merely the *decoration* of a system, so contrived as to conceal what that system really is.

“It is to be observed, however, that the Swedish *næmd* has a mission peculiarly its own. As already stated, the courts of general jurisdiction keep also the registers of real property, of mortgages, etc., and adjudicate all legal questions arising thereon. Those courts also act as guardians of minors. In the former matters, the *næmdemen* were, in old times, the depositaries of the publicity of the legal acts in question; and although the registers seem to fill their place now, the conception still obtains that it is useful to have them as witnesses to acts which concern the devolution of real property. In causes affecting minors, etc., the *næmdemen* of the district are in a certain way intermediaries between the court and its wards, and between the court and all who have need of its protection. In any matters of this kind their acquaintance with local and personal affairs is turned to practical use. It is not to be denied that this feature of our existing *næmd* system is a valuable one, though it concerns their administrative rather than their judicial functions.

"There, indeed, exists in Sweden a judicial body called a jury. I have not spoken of it before, because it occupies a position so limited and exclusive that its existence has scarcely any influence upon common procedure. Indeed, it has very little in common with the jury system as it exists in other countries and as it ought to be. It exists only in the courts of the cities in Sweden, and its functions are limited to cases of libels by printed books or papers. It was introduced by a law forming part of the Swedish constitution, as a means of protecting the liberty of the press. Its function is to find whether a writing, or any part of it, is libellous. It consists of nine men, of whom three are called by the judge, three by the plaintiff, and three by the defendant. Such a body more nearly resembles a board of arbitration than a real jury. Another peculiarity of its functions is that it is not present when the parties or witnesses are heard and examined before the judges, but it delivers its verdict after its members have perused the writing which is the subject of the action and the *protocoll* which has been drawn up by the judges. It is not unjust to this body to say that, during its existence, it has been useful as furnishing a shining example of the worst possible kind of a jury.

"My leading purpose in writing this article is to draw attention to the value of the system of trial by jury; and this affords me a good opportunity to observe upon the workings of the corresponding system in a country which had the true jury system in former times, but whose system is now very far from it. Let me, then, draw attention to what I conceive to be the principal points of value of a real jury system.

"1. Juries by their nature have a tendency to uphold good faith, to find out the real truth, and to establish equitable justice. I therefore think that, laying out of view the direct influence of the jury upon the decisions of the judge, if we had juries, or if our *næmd* were allowed to exercise the office of a jury, it would result in educating the people into the idea, that when they appear as suitors in the judicial tribunals, it is necessary for them to gain the good opinion of the tribunal by presenting themselves in the attitude of upright, honest, and truth-loving men; and that they will injure their cause by making false or garbled statements, by denying what they

know to be true, or by trying to suppress just evidence, and to gain their cause by means of formal exceptions, technicalities, or legal quibbles,—shifts and devices which have so grown with us as to become the legal and customary methods by which persons prosecute and defend actions in our judicial tribunals. It has come to such a pass that, in the popular conception in my country, there is no situation in life in which so little as regards truth and honesty is to be expected of a man, as when he presents himself as a party before a court of justice. This state of things could not exist except under a procedure where the solution of every question is referred to formal rules, and where the judge, practically acting alone, looks only to the letter of the law and to the strict rule of procedure, and is afraid to declare anything to be against law or justice where his decision is in any way protected by the textual phraseology. But juries are not thus afraid to declare as unjust what is against the plain meaning of the law, even if in some way the matter may be within its strict letter.

“ I need not suggest that such a system of legal procedure reacts prejudicially upon the moral conceptions of the people, affecting private intercourse injuriously. That this is a fact which seriously deserves the attention of the Legislature, I need scarcely remark.

“ 2. If the *næmdemen* were really to take it upon themselves to give decisions of their own in certain cases, or upon certain questions arising in judicial trials, it would have become necessary to devise some mode of proceeding by which they should be really informed of the facts of the case, as well as of the applicatory principles of law, and by which they should be brought to understand the case before them, so as to decide the question entrusted to them. But with the rule that the *næmd* is judge, not only over a part of the case, but over the whole case and over all cases; with the obvious fact standing out that, in order to perform this function, they must possess the same information concerning the case, from beginning to end, which is accessible to the judge; with these endless adjournments; with the method already described of embodying the leading incidents of the trial, including the evidence in the *protocoll*, and of excluding from consideration

everything which may have taken place before the court which is not thus reduced to writing,—our jury system has grown to be little more than a farce.

“If we had a jury system such as exists in your country, there would follow a necessity of pleadings, or of some analogous method of sifting out the real points in issue before beginning the trial in open court. The trial would then assume this just character: a contestation devised for the purpose of establishing the facts in dispute, and of enabling the court, with the aid of the jury, to give immediate judgment while the evidence was fresh in the minds of both, instead of merely affording the opportunity of drawing up a *protocoll*, to be studied by the judge in his private lodgings before giving a decision. In addition to degrading the office of the judge into that of a mere clerk of the parties, our system involves the absurdity of reducing the consultations between the members of the court, *i.e.* between the judge and the *nårmåden*, to a mere formality.

“If we were to introduce a system of jury trials similar to yours, the good influence which it would have in giving the people confidence in the administration of justice can scarcely be overestimated. Judicial trials would become lively and interesting popular spectacles. Justice according to law would be more highly esteemed by the people than now, because more intelligible. A trial for the establishment of legal rights would be endued with vitality, instead of presenting the spectacle of the mere thumbing and conning of dusty and mouldy archives.

“3. Another consequence of the introduction of such a system would necessarily be to raise the qualifications of the judges; for a real jury system presupposes the presence of a judge possessing high *practical* abilities, well grounded in the learning of the law, and holding his knowledge so well in hand as to be able to give sound advice and direction to the jury almost on the spur of the moment. Especially would it be impossible, under such a system, to elevate to the office of judge men whose only qualification is that they have attained the age of twenty-five years and have passed an academic examination. Nor could such an alteration in our system fail to have a wholesome effect upon legal procedure,—

bringing the Swedish *næmd* back to what it was in former times, rendering necessary new arrangements promotive of real justice, and in many ways shedding a favourable influence upon judicial administration, both in its form and substance.

“But among the benefits of a real jury system, as compared with the present system in Sweden, the most important would be its tendency to promote the principles of morality and justice; since conscience must ordinarily be the first rule of jurors in questions of doubt.

“I have reached these conclusions as the result of practical comparisons instituted between the two systems. During my sojourns in England, where I went to study the English law and its practice, nothing impressed me more than the fact that the rights and obligations of suitors were constantly referred to the rules of morality and conscience; whereas I know that in Sweden, where equity is an unknown principle in judicial administration, and also in Germany, the decision of the same questions would have depended exclusively upon formal rules and technical conceptions. I asked myself again and again whence this difference could have had its origin, and whether indeed the old story of the English jury could give the explanation. In this quandary I received a hint that I was right, from a source the impartiality of which could not be suspected—from one in whom noble character gave double weight to noble words. In one of my frequent visits to the Royal Courts of Justice in London, the Lord Justice Lindley, in a conversation, expressed to me his opinion, that *the reason why the English jurisprudence was so natural and moral was, that the people have so much to do in the English courts.* On another day his opinion was confirmed by Mr. Justice Matthew, who declared himself prepared fully to join in it, observing that the English jurisprudence was so *just* because of the people taking such a great part in it. Day by day and week by week in the English courts, I observed that the ruling idea of procedure was to have questions considered as the people, with their feelings for real truth and for natural and effective justice, would desire it. I thus came to the conclusion that the difference between the English and the Swedish procedure depended upon nothing else than the fact that, in the courts of England, the people have

much to say in the administration of justice; whereas the part which the people take in the administration of justice in Sweden is a mere fiction, without truth or reality.

"Undoubtedly, the prevailing method of vindicating legal rights, or defending against unjust legal prosecutions, reacts upon the people far outside the walls of the courts of justice—far over those boundaries where the law has a direct application. It is remarkable, from a political point of view, that our system has not only reduced to a mere fiction the influence of the people in the administration of justice, but also the ancient prerogative of the king as the highest judge of the country. It is formalism, the bureaucratic system, not the judges in person, who have been the gainers where the people have lost. The formalism of our system has grown to a sort of tyranny, eluding law and reason; ineffective as a means of making persons responsible for wrongdoing; confusing the habits of the people in private life in respect of real truth and real justice, and unfavourably influencing the domestic feelings of individuals.

"Had the old system of administering justice in Sweden been maintained—had the power of the people in the administration of justice been preserved, it may be doubted whether some of the hundreds or thousands of my countrymen who are now in America, would not have remained at home, instead of seeking abroad with uncertain hope what they vaguely felt they could not get in their own country."

Correspondence.

NOTARIAL EXECUTION.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I observe in the "Editorial" of your April number, an article on the subject of "Notarial Execution," occasioned by the recent decision of the First Division in *Lang v. Latta*. In the course of the article, allusion is made to certain matters which have already formed the subject of judicial decision, one of these, it is said, being "that he (the notary) cannot take infertment on a notarial instrument prepared by

himself." I have been unable to discover authority for this *dictum*; and as it is one which affects what I had understood to be a universal practice, I shall feel obliged for a reference to the case in point.—I am, yours truly, "LEX."

[In the case of *Craig v. Richardson*, 1610, Mor. 16,829, it was held that the same person cannot act both as procurator and notary. The case was not one of infeftment, but it has always been read as applying to an infeftment. Now, if A.'s procurator could not act as notary in executing the instrument of sasine in favour of A., *a fortiori* A., the party taking infeftment, could not himself act as notary in doing so. A modern notarial instrument is not strictly equivalent to an old instrument of sasine, but both are deeds, the recording of which completes a feudal title; and the necessity for impartiality in the execution appears to be as imperative in the case of a notarial instrument as in that of an instrument of sasine. In the case of *Tait*, 1848, 10 D. 1365, the sheriff-clerk-depute of a county in which the burgh lay was authorised to act as town-clerk of the burgh in expeding and recording infeftments in certain burgage subjects, in a case in which the party in whose favour infeftment was to be given was the wife of the town-clerk. In the last edition of Bell's Law Dictionary, a notarial instrument is described as "a narrative under the hand of a notary detailing procedure which has been transacted by or before him *in his official capacity*." It cannot, we think, be contended that a notary is entitled to act in this official capacity in a matter in which he is personally directly interested.—Ed. J. of J.]

Appointments.

MR. WILLIAM MACKINTOSH, Q.C., Dean of the Faculty of Advocates, has been appointed a Lord of Session and of Justiciary in place of the late Lord Fraser. Mr. Mackintosh was admitted a member of the Faculty of Advocates in 1865, and he worked himself steadily to the front in his profession. In 1881 he was appointed Procurator of the Church

of Scotland, and he held this office until 1886, when he resigned it upon his election as Dean of the Faculty of Advocates. At the same time he resigned the Sheriffship of Ross and Cromarty, which he had held for several years. On his appointment as Dean, he was created a Queen's Counsel. For the last few years the Dean has enjoyed the cream of the practice at the Bar. Mr. Mackintosh was a polished, though never a fluent pleader, and he had a wide acquaintance with case law, and a strong grasp of legal principle. The appointment is undoubtedly a strong one, and the new Judge commands the confidence and the entire goodwill of the profession.

MR. CHARLES LISTER SHAND, Barrister (1870), has been appointed County Court Judge for Liverpool, in succession to Judge Thompson, deceased. Mr. Shand, who was educated at Oxford, has practised exclusively at Liverpool. This is the third County Court appointment in succession that has gone to a Scotsman.

MR. JAMES KENNEDY DONALDSON, Advocate (1879), Queen's Advocate for Sierra Leone, has been appointed to act as Chief-Justice of that Colony.

MR. JAMES ABRAM M'CARTHY, Barrister (1879), has been appointed to act as Queen's Advocate for the Colony of Sierra Leone.

MR. HENRY SPENCER BERKELEY, Barrister (1873), Attorney-General of Fiji, has been appointed Chief-Justice of that Colony, in succession to Mr. Fielding Clarke, who has been appointed a Judge of the Supreme Court of the Colony of Hong Kong.

Obituary.

THE LATE LORD FRASER.

THE death of Lord Fraser, which we briefly announced in our last number, fell suddenly upon the Parliament House. Upon 20th March, the last day of the Winter Session, he was in his place upon the Bench, and upon 28th March he

had passed where no human writ can run. Lord Fraser practised for thirty-seven years at the Bar, and sat for eight years on the Bench, and on his death he was in his seventieth year. But although he had never been quite the same since a severe illness three or four years ago, nobody regarded him as a failing man, or one whose early demise was to be looked for. A few weeks before the close of the Session, he had an attack of cold which pulled him down a bit, but he returned to his work, and it was only on the last day of Session that he was seen to be again indisposed. He was an hour later than usual of taking his seat upon the Bench, and when he came to a case which was put out for judgment, he simply stated his finding, and added, "I have written an opinion, but it would give me great pain to read it; a copy may be had from my clerk." Still nobody supposed that this meant more than cold. His Lordship returned to the country, where apparently his health and spirits revived. Then suddenly, in a moment, and without another warning flicker, the lamp went out.

The life of the late Judge was not an eventful one, and its outline has already been sufficiently traced by the daily press. The son of a Perth burgess, he worked his way forward by persevering industry, and at the age of twenty-five he was admitted a member of the Scottish Bar. Here his progress, during a career of nearly forty years of practice, was slowly but steadily upwards. Sheriff of Renfrew in 1864, Dean of Faculty in 1878, and at last Lord of Session in 1881—these were the chief landmarks in his public career. There remains hardly more to tell. Patrick Fraser is a *study*, not a *story*.

It was as a legal writer that Fraser first made his mark. The first year or two at the Bar were devoted to the preparation of his work upon "The Domestic and Personal Relations." "And very miserable I would have been if I hadn't had this task to do," he has been heard candidly to remark. This work has since been greatly enlarged, and has been subdivided into three separate treatises: "Husband and Wife," "Parent and Child," and "Master and Servant." No Scottish legal works show equal research, not only in our own law but in mediæval and continental jurisprudence. No books upon

special branches of law are more constantly referred to. No Scottish writer since George Joseph Bell has made such a mark, and no lawbook of our day is so likely to live in legal literature as Fraser on "Husband and Wife." That every proposition laid down in these treatises is to be accepted without question, it is not for a moment suggested. There are other works, far less valuable, statements of the law in which can be accepted with much more confidence. Fraser was not a man to be content merely to give a catalogue of clearly decided points, and record all other questions as open or doubtful. He thought for himself. He formed opinions for himself, and having formed them, being an opinionative and courageous man, he enunciated them as law. Often he was right, but, being human, sometimes he was wrong. Partisanship of opinion is Fraser's fault as a writer. Once his opinion was formed, he was thoroughly loyal to it, all the more loyal if its warrant were somewhat unsatisfactory, and prepared, in default of apposite authority, to marshal pages of fervid prose in its support. No one was more sensible than Lord Fraser himself that some of the propositions in his works were "pious opinions" rather than ascertained law. He used sometimes to give amusing illustrations of this from the Bench. "But is there law for that?" he would inquire when some passage from his writings was flung at him from the Bar; or again, when counsel began quoting a passage, "Your Lordship says," he would interrupt him with, "Don't say, Mr. S., that I say so; say that the author of that book says so." But whatever be their shortcomings, Fraser's works remain at once the most instructive and the most readable legal literature of our time. We find in them law and learning, illustrated with eloquence, all aglow with warm human feeling.

Besides his larger works, Fraser was at one time a contributor to periodical literature. In the foundation of this Magazine he took a deep interest, and its pages have from time to time been adorned by contributions from his pen. No one, we believe, up to the very last, was a more constant or friendly student of its pages. Fraser, too, was an expert legal draughtsman. The Marriage Act of 1856 and the Conjugal Rights Amendment Act of 1861 were, we believe, both drafted by the deceased Judge.

At the Bar, although he long enjoyed an excellent practice, Fraser never attained the very first position as a pleader. The concatenation of circumstances and qualities which must conspire in order to give a man the first place amongst the leaders of the Bar are so complex, that it is as idle to attempt to explain why one did not as why another did attain it. Unpretentious in style, erudite, pawkie, and humorous, it is quite possible that, had Fraser lived fifty years earlier, or had he even come to the Bar with Deas, he might have obtained a still larger practice and left a greater reputation as a pleader. It was his misfortune, perhaps, to be the last of an old school, and to have to pit his ancient Scottish mannerism against modern Anglified "style." But we repeat that, although not at the very top of the tree, Fraser had a large and lucrative practice; and with a jury, or in a consistorial cause, or in any other case which required insight into human nature, he had few equals in his profession.

But it is on Fraser's last years at the Bar, when he had attained the coveted honour of Dean of the Faculty of Advocates, that one loves most to dwell. The value of that position, not to the holder but to the Bar and the profession, depends very largely upon the esteem in which the office is held by the Dean himself. Measured by this standard, Fraser stands head and shoulders above almost any other modern Dean of Faculty. Never was Dean prouder of his post, never did the holder more truly "magnify his office." The story is told of how, when an official of the Faculty went into the Dean's room to congratulate him on his elevation to the Bench, Fraser was silent for a time, and then replied, "Man, I could greet." The services which he rendered in this office, his interest in the Library, his zeal in seeking preferment for members of our Bar, and his kindly cordiality towards even the humblest intransigent to the profession, will long be held in grateful remembrance. Even after he had ceased to be Dean by his promotion to the Bench, he still cherished a warm interest in all that concerned the Bar; and this, too, sometimes found playful expression from the Bench, as when he observed, "Mr. D., does that book belong to yourself? for if so, you can do with it what you please; but if it belongs to the Library of the Faculty of Advocates, I will thank you not

to crumple the corners of the leaves." It is, we believe, mainly to Lord Fraser's exertions that the Library has maintained the privilege of receiving a copy of all books entered at Stationers' Hall, which, in 1878, the Government proposed to take away.

On the Bench Lord Fraser was one of the most popular of judges, and a very large number of cases were called before him. This popularity he owed partly to his prompt despatch of business, but more largely to his unvarying courtesy and willingness to oblige. An authoritative judge in the sense of being a judge whose decisions stood well upon appeal, he can hardly be said to have been. But this was due to no weakness of judgment or obscurity of vision, but rather to the strong opinionativeness of which we have spoken, and to an inclination to lean to equity to a degree even beyond the limits of authority. Nobody can help forming opinions and impressions before he has heard the whole of a case. The judicial temperament requires the constant repression of this tendency, and the power to control it even when it cannot be wholly repressed, so that inchoate opinion may not close the mind against the reception of opposite impressions. In this temperament Fraser, both as a writer and a judge, was somewhat lacking. He moulded new facts and authority to the opinion which he had already formed, rather than let new facts and authority mould his opinion. Again, his strong impression of the equities of the particular case before him sometimes blinded his eyes to the importance of adhering to well-ascertained principles and rules of law—of making his judgment square with a maxim "fit for law universal." Lord Fraser disliked juries, and had little confidence in them or belief in the justice of jury trial; but few judges could handle a jury better, and in the absence of the twelve there was no better jury than Lord Fraser himself. He had all a jury's virtues and a good many of a jury's failings; but the latter were tempered in him, as they are not always in a jury, by learning, experience, and knowledge of the world.

On the Bench, as in the world, Lord Fraser was somewhat of a character. No judge of our day was so out-spoken. He seemed almost to think aloud, even on the Bench, and it was fortunate, therefore, that his thoughts were never ill-natured.

Like Lord Deas, he used to comment with freedom on the way counsel conducted their cases before him. But there was a difference. Lord Fraser never broke the bruised reed. He would comment with much more freedom upon the conduct of an experienced senior than upon that of a junior. And if a novice was nervous and flurried, and made mistakes, he was safe to be treated with the most kindly consideration and forbearance if Lord Fraser was on the Bench. Frequenters of Lord Fraser's Bar were familiar with a quaint dry humour that was all his own. A counsel, who happened to have a double Christian name, had been hammering away for three-quarters of an hour before his Lordship, who was generally an admirable listener, when at length the judicial silence was broken, and the argument interrupted, by the judge leaning forward and inquiring with slow deliberation, "Mr. W., is your Christian name James Peter or Peter James?" On another occasion an advocate, whom his Lordship knew as well as he knew his own clerk, happened to be a witness in a cause before him. The witness's name was announced in the usual way by the macer, when his Lordship, looking gravely at him through his spectacles, inquired, "What are you?" And again, just the other day, when a senior, who had been thundering away for a couple of hours, wound up rather tamely, his Lordship, who no doubt had been wondering if the speech was never going to come to an end, seemed to invite even further eloquence by the remark, "What, Mr. S., and am I not to be treated to a peroration?"

In private life Lord Fraser was a genial and amusing companion. He was not a sportsman or a golfer, indeed we do not know that he ever took to any out-door amusement. All his life a keen student, he seemed to prefer the care of his bookshelves to that of his stable and his garden. But, for all that, no man loved the country more. At all Vacation times he was the first to repair to, and the last to leave, the country. The country mansions which in later years he rented in succession—Torrie, Valleyfield, and Gattonside—were to him sources of unfailing delight. He loved to wander down the avenues and along the country roads, and, unlike many scholars, he was exceedingly companionable on these occasions; he liked to have some member

of his household with him, and his fund of conversation was inexhaustible. He had just returned from one of these rambles when death found him, and in such scenes memory loves to leave him, surrounded by a circle whose family affection had been drawn still closer to him by the infinite kindness of his nature.

MR. JUSTICE STANLEY MATTHEWS, of the Supreme Court of the United States, died on 22nd March, at the age of sixty-five. The deceased Judge served in the Civil War, where he commanded a brigade. He was appointed a Judge of the Supreme Court in 1881. Mr. Justice Matthews was held in the highest esteem throughout the United States, and he appears to have been a man of a singularly upright and elevated character. The Senate at once adjourned on the announcement of his decease.

MR. FREDERICK GEORGE ADOLPHUS WILLIAMS, Barrister (1852), died on 15th April. Mr. Williams was a veteran law reporter. For more than a quarter of a century he has reported for the *Times* newspaper, and since the commencement of the Law Reports in 1865 he has been on the staff of the reporters.

THE LATE FRANCIS WHARTON.—The death of Francis Wharton, LL.D., which occurred in Washington on February 21, removes a notable figure from the ranks of the profession. He is known through his works wherever American law is read. His Digest of International Law, American Criminal Law, Law of Negligence, Criminal Practice and Pleading, and other works, have become standards. Among the most recent of his works, and one of the most notable, is that delightful book Commentaries on American Law. It is not generally known, we believe, that he was a D.D. as well as an LL.D.; that he left the law for the gospel, but returned again to his first love. A brief outline of his career will not be without interest. Dr. Wharton graduated at Yale in 1839, and practised law in his native city. He was professor of English Literature, etc., in Kenyon College, Ohio, from 1856 to 1863, when he was ordained a minister of the Episcopal Church, and became rector of St. Paul's Church,

Brookline, Mass. He was afterwards connected with the Episcopal Theological School at Cambridge, Mass., professor at the Boston Law School, and associate-editor of the Philadelphia *Episcopal Recorder*.—*Virginia Law Journal*.

The Month.

Murder from the best Motives.—"An interesting and in some respects an astonishing discussion," writes Mr. Herbert Stephen in the *Law Quarterly*, "which was recently held by the New York Medico-Legal Society, is reported in the December number of the Society's Journal. Dr. Thwing read a short paper entitled 'Euthanasia in Articulo Mortis,' in which he argued that in some cases of hopeless suffering a physician is morally justified in putting an end to his patient's life. The arguments for and against such a proceeding are obvious, but what makes Dr. Thwing's paper remarkable is the calmness of his avowals as to what he has himself done. He says that he once attended a lady, a relation of his own, who was 'stricken with apoplexy and hemiplegia. The age of the patient, a widow of sixty-six years, the severity of the attack and her plethoric habit, promised a fatal issue within a day or two. She lingered, however, five days, speechless from the first, and comatose.' Details of the lady's condition follow, from which it appears that she was, in Dr. Thwing's opinion, unconscious. 'The reality of suffering I could not admit, but the appearance of it in actions, purely reflex, was painful to me. As her only surviving kinsman, I took the responsibility of administering a mild anæsthetic.' Dr. Thwing then caused his dying relation to inhale a mixture of chloroform and sulphuric ether. This treatment caused her death in a quarter of an hour. In Dr. Thwing's words, 'Respiration became easy and a general quietude secured. Euthanasia was gained, and an apparently painful dissolution avoided.' The boldness of this avowal is made particularly conspicuous by Dr. Thwing's express admission, that the only person for whom the lady's death, if she had been allowed to die naturally, would have been in any degree painful was not the lady herself, but Dr. Thwing. It cannot be for a moment disputed that according to the law of

England, and I presume according to that of New York, Dr. Thwing murdered his patient. He asserts that his reason was not that it was a saving of pain to her, but that it put an end to a spectacle which was 'painful to me.' He says he killed her purely for his own personal convenience, because she had lived some three days longer than his medical learning and experience had led him to expect. And he seems to think his example worthy of imitation.

"Dr. Thwing adds another story of murder, but this time at second-hand. 'At the autopsy' of the lady already mentioned, 'one of the five physicians present gave a case where he had, at the request of parents, administered ether to a child suffocating in membranous croup, and produced euthanasia, not less to the relief of the parents than to that of the patient.' This killing, too, would undoubtedly be murder by our law, and, it seems to me, a much more morally culpable murder than that described by Dr. Thwing. It is generally believed that young children may possibly recover from such ailments as croup when all hope appears to be extinct. The consent of the parents can, of course, in such a case, no more supply a moral than it can a legal justification. It could never be possible for a physician to be certain that such consent was based on benevolence towards the child, even if there was no such thing as insuring the lives of children, or if they caused no trouble or expense to their parents.

"The lawyers and doctors who took part in the discussion were not unanimous, the majority apparently agreeing with Judge Davis, that such acts of 'euthanasia' were not morally legitimate; but they do not seem to have been at all alive to the far-reaching character of the right of deciding the question of life or death which is claimed by Dr. Thwing and his supporters. One of these, Mr. Clark Bell, told a story of 'a case where a child was suffering from cerebro-spinal meningitis, and in awful pain. Eminent physicians were consulted, and they all decided that the child must die. I was appealed to as the one who had the best right to decide. Would they be justified in using morphine? I assented. The child was about two years of age. They administered an eighth of a grain of acetate of morphia, and followed it by

hypodermic injections every thirty minutes, until several grains were given, and the child did not die. They all went away saying it would die before night, but it did not die, but lived for several weeks. It died in the end of marasmus. There was no apparent chance of its recovery.' No one appears to have been shocked by this, though the word 'apparent' suggests that there was a possibility of recovery. I am not physician enough to have an opinion whether Mr. Clark Bell and his eminent colleagues were guilty of murder or only of an attempt to murder, but the story of a company of eminent physicians trying in vain to kill a baby of two years old seems to me not less repellant than Dr. Thwing's description of how he poisoned his elderly relative because her unconscious writhings annoyed him. The extracts from the discussion which I have given afford, I think, grounds enough for a very conclusive opinion as to whether doctors are to be morally condemned when they seek to substitute their individual feelings and judgments for the plain and universal rule supplied by the criminal law."



Contempt of Court.—We have had occasion of late both to defend the legitimate exercise of a power of sentence for contempt and to protest against its abuse. We have therefore pleasure in calling attention to some very wholesome doctrine in the matter recently laid down by the Supreme Court of the United States, in an appeal taken against a sentence for contempt by the Circuit Court of California in the Sharon divorce case which we reported last month.

"We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the Court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the Courts in the

discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any Court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence. Nor, in our judgment, is it an inaccurate characterization of the present case to say that the petitioner's offence was committed 'at a time preceding, and separated from, the commencement of his prosecution.' His misbehaviour in the presence of the Court, his voluntary departure from the Court-room without apology for the indignity he put upon the Court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the Court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day and at the same session of the Court. The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the Court-room in the immediate presence of the judges. Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into Court, and giving him an opportunity to be heard before being fined and imprisoned, is a question not necessary to be considered on the present hearing."



A Curious Bill of Particulars.—Miss Alice M. Allan has

begun an action in the New York Courts against the State Steamship Company, for \$50,000 damages for injuries sustained by being poisoned while on board the *State of Georgia*, one of the steamers of that line. Miss Allan took passage on the steamer for America, after spending a vacation in Europe. She had a state-room in the saloon cabin. On the first day out she suffered from a slight cold, and she asked the stewardess for five grains of quinine. She was given a preparation. She was taken violently ill, and before reaching New York six of her teeth fell out, and subsequently part of her jawbone had to be removed. Since then she has been unable to do work of any kind. The following are the terms of the Bill of Particulars—or, as we should express it, the specification of the acts of carelessness complained of—furnished by the plaintiff's counsel:—

"1. The drugs were ill assorted, came on board ill assorted, continued to be ill assorted; that those who should have assorted said drugs, labelled and kept them, were intemperate in their habits, were shiftless and careless, held human life and physical perfection lightly, and would mar or destroy the same with careless levity.

"2. That the drug stock consisted of pure and impure drugs; that they were bought by contract *with Scottish stinginess and thrift*.

"3. That the physician or person who should mix and compound the pure and impure drugs to the best advantage of the company that safety to the passengers would permit, could not at times tell a hawk from a handsaw, arsenic from saleratus, quinine from calomel, and whose continuous vision of snakes pruned his mind to poisons, to handle them, compound them, prescribe and administer them.

"4. That the laboratory or apothecary shop was disarranged and disorganized, that his pharmacopœia was disregarded and unused, that the dust rested upon its pages, and that instead of the shelves being the resting-place of correctly labelled piles, it was a jungle where chaotic chance played hide-and-seek with order and malicious jokes upon the unsuspecting pilgrims to the ship's dispensary."

The counsel for the steamboat company contended that the plaintiff's counsel was making a fool of him, and asked the

Court to compel him to furnish a proper Bill of Particulars. The motion was refused. We wonder what a judge of the Court of Session would say if asked to find such averments relevant, and to allow the pursuer to go to trial upon them.



Is the English Bible Sectarian? — Judge Bennet, of the Twelfth Judicial Circuit of Wisconsin, has delivered an important and interesting opinion in *Weiss v. School Board of Edgerton*, on "the Bible in the schools." The action was by Roman Catholic parents for a peremptory writ of mandamus directing the reading of the King James version of the Bible in the public schools to be discontinued. The reading was not compulsory, nor were the plaintiffs' children required to be present at the reading. The exclusion was demanded on the ground that the reading was "sectarian instruction," and an unconstitutional interference with the rights of conscience. Judge Bennet reviews all the cases and discusses the principles in an opinion of seventy pages, and comes to the following conclusion: — "I have never in any book found thoughts expressed with greater clearness, or in a style at once more beautiful and sublime than in those quotations from the Psalms of David, the writings of the great apostle to the Gentiles, and in the language of our Saviour taken from the Gospels. I am unable to find anything in them tending to sectarian instruction, or that can be justly said to interfere with the tenderest or most sensitive religious conscience in the slightest degree. The reading-books, as well as those treating of the sciences, are constantly changing in our public schools. Those in which I read and studied when a lad are, with the exception of the Bible, almost entirely unknown to the present generation, save only those in the dead languages. But the Bible remains, and it would seem like turning a good, true, and ever faithful friend and counsellor out of doors to exclude it from the public schools of the State. And I have been unable to find any authority in the decisions of the Court for so doing. No Court has ever yet held, that I am aware of, that it is unconstitutional to read the Bible in the public schools. The Supreme Court of Ohio have held it may be excluded from the public schools by the trustees and boards of educa-

tion, but not by the Courts. While in Maine, Massachusetts, and Iowa, under constitutional provisions similar to our own, the Courts sustain the trustees and school committees in adopting it as a book in every way suitable and proper to be read on the opening of the schools each day."



Chief-Justice Fuller.—According to the *Albany Law Journal*, "the press is making itself too familiar with the Chief-Justice's family affairs. He is considering whether he shall shave off his moustache. This is his own affair (or off-hair, as the case may be), but we hope he will not cut it off, in spite of the wishes of his brethren. The *Chicago Herald* pertinently and impertinently says, 'It is another case of the fox which lost its tail.' Then his daughter has eloped and got married. We should think a man with seven of the same sort left would not worry much over that. It seems not a bad way to reduce the surplus. And then he should reflect how Eldon stole his 'Bessie'—(God bless her!)—out of a second-storey window, and how Judge Cooley discovered no constitutional limitation of his right to elope with his best girl." The remainder of the paragraph forms a singular commentary upon the opening sentence, and reminds one of the sapient parent who counselled his offspring to avoid profane swearing, as it was "a d—— bad habit."



Commercial Corners and the Civil Law.—In an editorial paragraph in the *Canadian Law Times*, Mr. A. H. Marsh, Q.C., furnishes a translation of an edict of the Emperor Zeno, issued to the Praetorian Prefect of Constantinople, A.D. 483 (Code IV. 59), which runs as follows:—"We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an Emperor already procured, or that may hereafter be procured, or under an Imperial decree, or under a rescript signed by Our Majesty; *nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they*

may have agreed upon among themselves. Workmen and contractors for buildings, and all who practise other professions, and contractors for baths, are entirely *prohibited from agreeing together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it*; full liberty is given to any one to finish a work begun and abandoned by another, without apprehension of loss, and to denounce all acts of this kind without fear and without costs. And if any one shall presume to practise a monopoly, let his property be forfeited, and himself condemned to perpetual exile. *And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay forty pounds of gold.* Your court shall be condemned to pay fifty pounds of gold if it shall happen, through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants shall not be carried into effect." Mr. Marsh regrets that some such vigorous legislation is not enacted and enforced at the present day.

* * *

Licensing.—The Magistrates for the Arbroath district of Forfarshire have decided that they have power to grant an extension of hours to the holders of licences during the summer months, notwithstanding a resolution of the Justices of the County in Quarter Sessions, made in terms of the Act of 1887, that all licensed premises must be closed at 10 o'clock. The matter is likely to be heard of further.

* * *

"The Shand Valse."—Such is the title of one of the dances at a ball given the other day by the Biarritz Golf Club. And yet there are people who talk of the decadence of the Parliament House! Monboddo was renowned in his day, and made some stir in London, but we do not read that his fame reached to where the Atlantic rollers break beneath the shadow of the Pyrenees!

Lawyers in High Places.—Last week a democratic lawyer was President of the United States. This week a republican lawyer is President. It is but just to ex-President Cleveland to say that he made an excellent executive officer. He is now an active working partner in a law office in New York City. He is to be commended, after occupying the highest position within the gift of the people, to again come back to the ranks of the Bar.

For a man to imagine because he has been President, he is above toiling for a living or engaging in business pursuits, and that he must stand idly by, and wait for death to come and take his life, which has become useless to the community, is certainly a deplorable condition.

President Harrison has taken command of the ship of State as if he felt confident in his ability to give the country a strong administration, and we have no doubt he will do so.

We hope, before his administration closes, every citizen, North or South, without regard to whether he is a democrat or republican, shall be protected in his right to go to the polls and vote just as he pleases.—*Chicago Law Journal*.

English Decisions.

GAMING.—*Betting agency—Breach of contract to make bets* (8 and 9 Vict. c. 109, sec. 18).—An agent was employed by a principal to make bets for him. He failed to make the bets. Had the bets been made, the principal would have won a considerable sum. *Held*, that no action for damages lay by the principal against the agent, the bargain being one to make contracts which would have been null and void.—*Cohen v. Kittell*, Q. B. Div. (Huddleston, B., and Manisty, J.), 11 March 1889.

TRUSTEES.—*Depreciated securities—Duty to call in.*—Observed that it is not the duty of trustees who hold mortgages which were originally proper investments, but have depreciated in value, to call them in immediately that the value has fallen so far as to leave less margin than is required by the Court for a fresh investment. But it is their duty when they find the security becoming insufficient, to consider and decide, as practical men, what is best to be done, having regard to all the circumstances, including the risk of having the property thrown on their hands.—*Eland v. Medland*. Ch. Div. (North, J.), 16 March 1889.

MARINE INSURANCE.—*General and particular average*—"War-
ranted free from average under 3 per cent., unless general."—A particular
average loss under 3 per cent. is not recoverable under a policy of
insurance containing the above clause, although there has been at
the same time a general average loss, which, if added to the
particular average loss, would make the total loss more than 3 per
cent.—*Price & Co. v. The "A 1" Ships Small Damage Insurance Co.*,
Ct. of App., 18 March 1889.

CONTRACT.—*Principal and agent*—*Ratification of contract made by
unauthorized agent*.—Where a contract has been entered into by an
agent without his principal's consent, and beyond the scope of the
agent's authority, the principal may ratify and enforce the contract,
although in the meantime the other party has repudiated it.—
Bollon v. Lambert, Ct. of App., 18 March 1889.

CONTRACT.—*Payment*—*Cheque sent in full*—*Right to retain as pay-
ment to account*.—A. sent to B. a cheque "in full of all demands."
B. cashed the cheque, and sent a receipt of the payment "on
account," and asked a cheque for the balance. *Held*, that the
keeping of a cheque sent in full of all demands was not conclusive
evidence, from which an accord and satisfaction must in law be
presumed.—*Day v. M'Lean*, Ct. of App., 18 March 1889.

SUCCESSION.—*Settlement Construction Vesting "survivors."*—A
testator bequeathed a fourth part of certain funds on the death of
each of his four children to the children of the deceased child, and
the settlement then proceeded:—"In the event of any of my said
children dying without issue, I give the said fourth part unto the
survivors of my said children in equal shares and proportions."
The last survivor died without issue, and the question arose
whether the fourth share which his children would have taken
belonged to his estate, or whether it passed under the residuary
clause in the settlement. *Held*, that the word "survivors" must
be construed as meaning the longest lives or liver, and that the
fourth share in question went to the legal representatives of the
last surviving child.—*Morrell v. Gissing*, Ch. Div. (Chitty, J.),
21 March 1889.

REPARATION.—*Ship collision*—*Contributory negligence*.—Where a
ship, in violation of the rules of navigation, takes a course which
throws another ship into imminent danger, the ship so threatened
is bound to alter her course to avoid danger, and if it was practicable
so to avoid it after the risk was seen, the ship so failing to alter
her course is in default, and in part accountable for the collision.—
The Tasmania, Ct. of App., 25 March 1889.

COMPANY.—*Underwriting shares*—*Discount*.—*Held*, that under-
writing shares means that the underwriters will themselves take up an
allotment of the shares underwritten by them remaining unapplied
for, and that the word "discount" in such a contract meant com-
mission, and did not invalidate the contract as rendering it one
to issue shares at a discount.—*Re Licensed Victuallers Mutual
Trading Association Limited*, Ct. of App., 25 March 1889.

COMPANY.—Transfer—Refusal to register—Liability for subsequent calls.—A board of directors postponed consideration of transfers until the other business of the meeting had been disposed of. In the course of that business, a resolution or resolutions to make a call was passed. *Held*, that the directors had a right to arrange the order in which the business at the board meeting should be taken, and were justified in making the call before considering the registration of the transfers, and that the circumstances to be considered were those at the time when the transfers came before the directors in due course, at which time a call had been made by a valid resolution as the time and place for payment of the call might be fixed, as was done by a subsequent resolution.—*Re Cavley & Company Limited*, Ch. Div. (Chitty, J.), 27 March 1889.

SUCCESSION.—Settlement—Specific legacy—Liability of executor to replace where co-Executor has absconded with proceeds.—By her will a testatrix left to A. £600 of consols, by virtue of a power of appointment, and appointed B. and C. her executors. The consols stood in the name of the trustees of the settlement under which the testatrix held them, and on her death the trustees sold the consols, and paid the proceeds into bank to the credit of the executors of the will. A cheque for £600, drawn to the order of the legatee, was signed by B., and sent to C. for his signature. C. forged the endorsement of the cheque, obtained the money, and absconded. The legatee had not consented to the payment of the legacy in cash. *Held*, that as the legacy was specific, the executors should have reconverted the cash into stock, and that B. was therefore liable to replace the stock.—*Cutler v. Boyd*, Ch. Div. (Kekewich, J.), 29 March 1889.

CHEQUE.—Bill of exchange—Post-dated cheque—Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), sec. 29—Stamp Act, 1870 (33 and 34 Vict. c. 97), secs. 17 and 54).—*Held*, that a post-dated cheque is a valid and negotiable instrument, does not require an *ad valorem* stamp, and is complete and regular upon the face of it.—*Hitchcock v. Edwards*, Q. B. Div. (Cave, J.), 1 April 1889.

SEA FISHERIES ACT, 1883 (46 and 47 Vict. c. 22).—Prosecution—Proceedings by private persons.—*Held*, that the sea fishery officers alone are the sole and proper persons to institute proceedings for the enforcement of the provisions of the Sea Fisheries Act.—*Reg. v. Cubitt*, Q. B. Div. (Coleridge, C. J., and Charles, J.), 2 April 1889.

REPARATION.—Shipping—Fog-horn.—A fishing smack ought not to go to sea with only one fog-horn on board, and if she breaks or loses this fog-horn, and comes into collision with another ship through failure to give the necessary fog-signals, her owners are liable in damages.—*The Glenavon*, Adm. Div. (Butt, J.), 2 April 1889.

COMPANY.—Issue of shares at a discount—Rectification of register.—*Held*, that the issue of shares to the amount of a debt due to a company, with an addition of fifteen per cent., was an issue of

shares at a discount, and was therefore unlawful, and that the person to whom they were issued was entitled to have his name removed from the register.—*Re Midland Electric Light Company Limited*, Ch. Div. (North, J.), 29 March 1889.

WILL.—Construction—Foreigner—Domiciled Scotsman and English real estate.—A domiciled Scotsman, being possessed of freehold and leasehold estate in England, by his trust-disposition and settlement gave all his real and personal property to trustees, with power to convert, and he directed them to pay certain pecuniary legacies to charities in England and Scotland. On failure of his issue, he disposed the ultimate residue of his estate among certain specified charities. The charitable bequests, so far as they were payable out of the proceeds of English freehold or leasehold property, being void, the question arose whether the next of kin, according to English or according to Scots law, were entitled to the undisposed leaseholds or the proceeds of the same. On a case stated by the Court of Session for the opinion of the English Court, *Held*, that the persons who were entitled to take the sums which, had it not been for the Mortmain Act, would have gone to satisfy the charitable bequests, were as to the leasehold property or the proceeds thereof the persons entitled to the testator's personal estate as next of kin according to the English Statute of Distributions.—*Duncan v. Lawson*, Ch. Div. (Kay, J.), 6 April 1889.

LANDS CLAUSES ACT, 1845 (8 and 9 Vict. c. 18), sec. 63.—*Part of estate taken—Depreciation in value of remainder.*—A part of some land laid out as a building estate was taken under the Act for the purposes of a sewage farm. The value of the other parts of the estate situated near the part taken, but separated from it by intervening land belonging to other owners, was thereby depreciated. *Held*, that the owner was entitled to compensation under sec. 63 of the Act, for damage to the other parts of the estate. Judgment of the Court of Appeal reversed.—*Essex v. Acton Local Board*, House of Lords, 8 April 1889.

LIBEL.—Report of judgment in action—Semble, that the report of the judgment in an action without the evidence is not necessarily privileged, though published *bona fide* and without malice.—*Macdougall v. Knight*, House of Lords, 8 April 1889.

INLAND REVENUE.—Stamp duty—Agreement to sell the good-will of a business to a limited company—Stamp Act, 1870, sec. 18.—*Held*, that an agreement to sell the good-will of a business to a limited company did not operate as a transfer, either legal or equitable, of the property comprised in it, though it gave a right to the company to have a conveyance executed if the conditions precedent were published on the day for the completion of the purchase, and that the agreement was not therefore chargeable with an *ad valorem* stamp duty.—*Lewis v. Com. of Inland Revenue*, Q. B. Div. (Coleridge, C. J., Hawkins, J.), 8 April 1889.

TRADE MARK.—Registration—Words calculated to deceive—Patents, Designs, and Trade Marks Act, 1883, sec. 73.—The appellant, Dunn, applied for the registration of a trade mark for baking powder, which comprised the words "fruit salt." The respondent, Eno, opposed on the ground, that before adopting the expression the appellant was aware that the respondent used the same for an effervescent draught, and that the use of the words proposed by the appellant was calculated to deceive. *Held* (reversing Kay, J., *diss.* Cotton, L. J.), that the words were not calculated to deceive, baking powder and an aperient draught being totally different things, and that the appellant was entitled to registration.—*Re Dunn's Trade Mark*, Ct. of App. (Cotton, Lindlay, and Fry, L. JJ.), 9 April 1889.

GAME LAWS.—Close time—Foreign birds—1 and 2 Will. IV. c. 32, sec. 4.—A game-dealer was convicted and fined for having two partridges in his shop ten days after the commencement of close time. The partridges had been imported from Russia. *Held* (*diss.* Manisty, J.), that the statute did not apply to foreign birds, and conviction accordingly quashed.—*Guyer v. Regina*, Q. B. Div. (Coleridge, C. J., Manisty, J., Hawkins, J.), 13 April 1889.

COUNTY COUNCIL.—Local Government Act, 1888—Election—Female member.—*Held*, that a woman cannot be a member of a County Council, and that votes given in favour of a woman are thrown away, and the candidate having next most votes is entitled to the seat.—*Beresford Hope v. Lady Sandhurst*, Q. B. Div. (Huddleston, B., and Stephen, J.), 13 April 1889.

JURISDICTION.—Service out of jurisdiction—Scottish company—Rules of Court.—Rule 1 of Order 11 of the Rules of Court, 1883, provides that "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever—(f) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof." An application was made for leave to serve a writ in Scotland in the following circumstances. The action was brought to restrain the infringement of the plaintiff's registered trade mark. The defendants were a joint-stock company, having their registered office in Glasgow, and branches in London, Manchester, and Hull, which last place was within a short distance of the plaintiff's place of business. The plaintiff in his affidavits stated that the defendants were supplying the goods of which he complained as infringing his trade mark from their places of business at Manchester and Hull. He further stated that it would be necessary to call in support of his case a considerable number of witnesses, all of whom were resident in England; and he argued that an injunction could be enforced by sequestration against the defenders' property in England. *Held*, that leave to serve the writ should be granted.—*Burlands v. The Roxburgh Oil Company (Limited)*, Ch. Div. (Chitty, J.), 9 April 1889.

Sheriff Court Reports.

SHERIFF COURT OF FIFESHIRE.

Sheriffs MACKAY and HENDERSON.

KIRKCALDY v. LANDALE.

Master and Servant—Dismissal—Nature of employment.—A ploughman engaged to work a pair of horses is not bound on his master's orders to break in a young horse, and cannot lawfully be dismissed for refusing to do so.

Master and Servant—Dismissal—Quantum of damages.—A farm servant dismissed between terms, and who has sought other employment, is entitled to his full wages until the next term, under deduction of anything actually earned by him in the interval.

This was an action by a farm-servant for damages for wrongous dismissal. The circumstances appear from the Sheriff's note. The Sheriff-Substitute decerned against the defender, and assessed the damages at £37, 12s. 4d. On appeal, the Sheriff adhered to this interlocutor with this exception, that he found that deduction should be made of the sum of £1, 10s., earned by the pursuer since his dismissal, from the amount of damages found due, and in respect of this alteration he recalled the finding by which the damages were assessed at £37, 12s. 4d., and assessed them anew at the sum of £36, 2s. 4d., and found the pursuer entitled to additional expenses. The following note was appended to the interlocutor :—

“There are three questions which require consideration in this case, but the Sheriff concurs with the Sheriff-Substitute in all points, except a minor detail as to the amount of damages. (1) Was the action well brought against Robert Landale? He hired the pursuer, and paid him £3 of wages up to the day of dismissal. The dismissal was at his instance, although his father concurred in it. It is contended that the tenant of the farm being John Landale, an uncle of the defender, the action should have been brought against him. But he is in business as a confectioner in London, and his name was not disclosed until Mr. Woodcock's letter, written immediately before the present action. It is further said that the pursuer must at least have known that the defender was not the tenant of the farm. It is not enough, however, to relieve an agent who does not disclose his principal, when he makes a contract, from liability, that the persons with whom he contracts might have discovered that there was a principal not expressly disclosed. If there was no express disclosure, the facts must be very plain which are to be held to imply it. The facts here were certainly not so. The name on the carts was that of John Landale,

a deceased brother, whom James Landale had succeeded. It would be unreasonable to expect a ploughman to consult the Valuation Roll, which was the only other fact of importance founded on. All that the servants on the farm were at all likely to know was that it was managed by some family arrangement, and that they got their orders, sometimes from the defender, and sometimes from his father. When the tenant was disclosed, the pursuer elected to sue the defender, the party with whom he had contracted, and he was quite entitled to do so. (Bell's Prin., sec. 224a.) (2) Was the dismissal justifiable? There can be no doubt that the ground of it was a refusal to break in a staig, and the question is, whether this was reasonably within the scope of the defender's employment. The evidence as to this is very clearly that it is an extra work, attended with some difficulty and even danger, and, when undertaken, is usually remunerated by extra payment. The pursuer had been expressly hired to work a pair of horses, and had not undertaken to break in a staig. . . . The Sheriff comes without doubt to the conclusion that this was work of a kind for which the defender was not hired, and that his dismissal was not justifiable. (3) The third question is as to the amount of damages, which is said to be too large. No doubt a considerable part of the year, from Martinmas 1888 to Martinmas 1889, has not yet expired. But it is very difficult for a ploughman to get employment between terms, and the pursuer has not succeeded in doing so. He tried to get a place, but failed, and he has earned £1, 10s. in orra work, as a mason. But this employment has ceased, and it is not reasonable to expect that he will get more of it, as he is a ploughman and not a mason by trade. The Sheriff-Substitute thought that, the dismissal being unjustifiable, the whole year's wages should be allowed, but it seems fair, in estimating the damages, to deduct the amount actually earned. The question of the measure of damages in such a case is not very clearly fixed by decision. But the opinion of Lord Deas in *Ross v. Pender* (8th Jan. 1874, 1 R. 357),—"It is not often that a dismissed servant is found entitled to the whole of his year's wages; he is bound to work if he can obtain employment,"—appears correctly to express the equity which has been allowed in modern times to modify the older law on this subject. The alteration in the interlocutor upon this point is too slight to deprive the pursuer of any part of his expenses."

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Mysterious "High Judicial Office."—There is a prevalent notion that there exist a number of fat judicial appointments in London, in connection with that august tribunal the Privy Council; and the rumour is again and again revived that some eminent Scottish judge is aspiring after such preferment. No such appointments exist. Instead of salaried judicial members of the Privy Council, there are now, under the Act of 1876, Lords of Appeal in Ordinary, who sit both in the House of Lords and on the Judicial Committee of the Privy Council. Only two Lords of Appeal were at first to be appointed under the Act of 1876, but the Act contained a provision, that whenever two vacancies occurred among the salaried members of the Judicial Committee of the Privy Council, another Lord of Appeal should be appointed. As there were four salaried members of the Judicial Committee, provision was therefore made by the Act for four Lords of Appeal. One vacancy has already occurred, and it was filled by the appointment of Lord Fitzgerald. There is still one Lordship of Appeal to fall in. At present there is one Lord of Appeal for each of the three kingdoms—Lord Watson for Scotland, Lord Fitzgerald for Ireland, and Lord Macnaghton, who succeeded Lord Blackburn, for England. If the constitution of the Court be the same when the last appointment opens, it is all but certain that the fourth Lordship of Appeal will go to an English lawyer, as neither Scotland nor Ireland could

well claim more than one each out of the four appointments. The riddle remains unsolved—Where is this high judicial office in connection with the Privy Council, which the local gossips and the provincial press assure us is so soon to rob the Scottish Bench of a distinguished ornament?



The Crofters Commission and Arrears.—It is clear that the Crofters Commissioners are opportunists. Their recent decisions show a moderate reduction of rent, and a large cancellation of arrears. Of the propriety of either the one or the other, outsiders have not the means of judging; but it is hard to reconcile the action taken in the two classes of cases. The difficulty becomes the greater when the figures are looked closely into. The cancellation of arrears is out of all proportion to the reduction in the rents, and does not seem to bear a direct relation to the reduction in each particular case. One might have supposed that the Commissioners would cancel arrears only to the extent to which these arrears were attributable to excessive rents. This is the only logical course, for in so far as they are accumulations of just rent, which the tenant has withheld, there seems to be no claim for their cancellation. Indeed, it is inconsistent to fix a rent as fair—and which presumably therefore the crofter is able to pay—and to cancel arrears which would exist if the rent were calculated back at the reduced rate to the time when these arrears began to accumulate, for this is to remit rents which in the view of the Commissioners themselves the crofters ought to have paid. In some cases we observe arrears have been cancelled to a very large extent where the Commissioners have not altered the present rent. The bad feature of the affair is, that the great part of these arrears are not old scores which have been hanging on for many years, or have gradually accumulated, but are the result of a deliberate strike against rents during the last year or two. Now, where a man has paid his rent regularly, down to say 1884, and since then has paid no rent at all, it seems a very strong order to cancel three-fourths of the arrears which have accumulated during the last four or five years. The only possible defence for such action is *opportunism*. The crofter has dishonestly withheld his rent, he

has no claim to consideration, it is bad in principle to let him off; *but he can't pay*. The money which ought to have gone to the landlord has found its way elsewhere. If the arrears are not cancelled, it will be impossible to recover them, the attempt to do so will provoke fresh troubles, and the burden round his neck will hinder the crofter from making a serious effort honestly to meet the judicial rent in the future. Let him at all events get a fair start. Considerations like these have no doubt weighed with the Commissioners. We do not say that they are wrong, but we cannot forbear directing attention to the evidence of one of the most intelligent witnesses before the Special Commission, who, whilst expressing cordial approval of the Irish Land Act of 1881, strongly condemned the Arrears Act of 1882, which in his opinion had destroyed the public sense of honesty, and demoralized the peasantry and small farmers. It is a dangerous experiment for the State to make dishonesty pay.



A Case of Enoch Arden.—In the Court for the consideration of Crown cases reserved, the judges of the Queen's Bench Division in England have given their decision on a question arising out of a rather romantic set of circumstances. In the case of *The Queen v. Tolson*, the prisoner, a woman, was charged with bigamy. She was first married on 11th September 1880. The marriage was an unhappy one, for she was deserted by her husband in December 1881. Tolson and her father subsequently made inquiries as to the whereabouts of the missing spouse. In the course of these investigations they were led to believe that he had been drowned in a vessel which they ascertained had been lost at sea; and, acting on this information and belief, the prisoner married a second time in January 1887. Then it turned out that the first husband had not been drowned, as was supposed, for he suddenly reappeared in 1887. Tolson had therefore committed bigamy. There seems to have been no question of her *bona fides*; when contracting the second marriage, the unfortunate woman undoubtedly believed herself to be single. Section 57 of the Act 24 and 25 Vict.

c. 100, provides that, whoever, being married, shall marry any other person during the life of the first wife or husband, shall be liable to the penalties prescribed, provided that nothing therein "shall extend to any person marrying a second time whose husband or wife shall have been continually absent for seven years last past, and is not known to be living at the time." The provision is just and considerate; but then Tolson had anticipated the expiry of the statutory seven years by fully ten months. The prisoner was accordingly tried for bigamy. The jury found that she had in good faith, and on reasonable grounds, believed her first husband to be dead. Mr. Justice Stephen reserved the case. The Court reversed the conviction on the 11th May, though not unanimously. Mr. Justice Manisty, Mr. Justice Denman, Mr. Baron Pollock, Mr. Justice Field, and Mr. Baron Huddleston formed the minority who were in favour of sustaining the conviction. The Lord Chief-Justice, with Justices Hawkins, Cave, Wills, Grantham, Charles, Day, A. L. Smith, and Stephen, in reversing the conviction, went on the ground that it is a principle of law that, ordinarily speaking, a crime is not committed if the mind is innocent; and that the prisoner in this case was morally innocent. This humbly seems to us to be just. Most people will agree with Mr. Justice Stephen's remark, that to have contracted an invalid marriage, as this unfortunate woman has done, is of itself sufficient punishment for one who had been morally, even if not technically, innocent.



Corporal Punishment.—When sentimentalism comes in at the door, common-sense, it would seem, flies out at the window. There has been much mawkishness over the not very savoury, but very important subject of flogging criminals. A Bill to consolidate and amend the law relating to corporal punishment, introduced by Mr. Milvain, Member for Durham, was read a second time in the House of Commons on the 8th of May. On the one hand, it is proposed to abolish the punishment by flogging of incorrigible rogues,—a reform about which there is general agreement, for that unquestionably is a class with whom punishment of the kind is utterly ineffectual. On

the other hand, the measure proposes that all offenders under the age of sixteen years may be flogged with a birch rod; and, in the case of adults, the provisions of the Bill extend to three classes of offences, viz.:—(1) Burglaries, when the burglars are armed with a dangerous or an offensive weapon, (2) Rapes, and (3) Certain offences under the Criminal Law Amendment Act, which have become shockingly frequent of recent years. The Bill, on both its sides, seems to us to be required, and, if passed into law, likely to be attended with salutary results of a deterrent kind. But there are some worthy people so sensitive that they are unable to contemplate the idea of even a scoundrel suffering physical pain. The second reading was opposed, of course. The hon. member who moved the rejection of the measure rested his case on the proposition, that they would, in passing the Bill, be “taking a backward course in the direction of brutalizing punishment.” It might be rejoined that our criminals have been taking a backward course in the increasing brutality of their crimes. We observe, too, that the Recorder of Liverpool has been expressing his detestation of the proposal on the same ground, and expressing a devout hope (in public) that he may never be brutalized and hardened into inflicting the corporal penalty. Such squeamishness on the part of so enlightened a man surprises us. This Bill has been the theme of much newspaper eloquence of a more or less exaggerated kind, and of a more—certainly not less—mawkish character. One journal, which by its name professes to be a leader of public opinion, describes the Bill as a “legal method of creating or perpetuating desperadoes.” “To speak of it as merely unchristian,” writes this calm and temperate periodical, “is gross flattery. It is diabolical, and, like all diabolism, a form of insanity.” It is “wantonly, sardonically, Satanically cruel.” In the face of these elaborate adjectives, it is satisfactory to be able to record that the Corporal Punishment Bill passed the second reading by a majority of 68—a number which bodes well for the fate of the Bill, and for the success of those who have some pity to spare for the poor victims of brutal, selfish, and revolting crimes, and do not lavish all their stock of it on the ruthless perpetrators.

Volenti non fit injuria.—What amount of compulsion, and that of what kind, are necessary to transform a *volens* into a *nolens* in the eye of the law? The imminent risk of losing his situation if he refuse to continue to work at a dangerous occupation without safeguards which he has demanded, is not sufficient stress to render a workman *nolens*. So it has been decided by the House of Lords in *Membery v. The Great Western Railway Company*, a case which, after a prolonged career and strange vicissitudes in the Law Courts, ended before that tribunal on 14th May last. The case disclosed circumstances of considerable hardship for the plaintiff. It had, too, the advantage of coming before and being decided in turn by no fewer than four tribunals of high authority—notwithstanding the fact that Membery sued as a pauper. The plaintiff followed the calling of a shunter. He was in the immediate employment of one Younghusband, who had, in 1864, entered into a contract with the defendants to supply horses, with a man to each horse, to shunt trucks upon the defendants' line of railway at Paddington. The defendants undertook to supply a boy to assist in such work, to attach and detach the horse to and from the trucks. This they did regularly until 1877. After that the boy was supplied only occasionally. In the case there was evidence to show that it was dangerous to do the work without the boy; that the men were constantly complaining on this ground; and that on the very night of the accident the plaintiff applied for the assistance of a boy to the foreman, whose reply was that when he had a boy at his disposal the plaintiff should have him. Membery accordingly went on with his work without obtaining the help of a boy, and he was injured by an accident while so engaged. He brought an action to recover damages for the injuries he had sustained; and in this action he experienced varying fortune. Before Mr. Justice Manisty and a jury, the plaintiff obtained damages. The defendants appealed. A Divisional Court, consisting of Mr. Justice Matthew and Mr. Justice A. L. Smith, dismissed the appeal. Again the defendants appealed, and now the tide turned. The Court of Appeal, sitting Lord Esher and Lords Justices Lindley and Bowen, reversed the judgment of the Divisional Court, holding that Membery had "voluntarily" incurred the risk, and

so was debarred from recovering damages for the accident. It was now the plaintiff's turn to appeal, and there remained to him the Court of last resort. His case was heard before the House of Lords, and their Lordships, without calling upon counsel for the respondent, dismissed the appeal. The Lord Chancellor thought that the maxim *volenti non fit injuria* ruled the case before them. Lord Bramwell put it that Membrey, "being under no *physical* compulsion" to do the work, nevertheless did it; and having chosen the alternative of doing it and not that of not doing it, he was *volens*. This, then, is the law. The stress of physical compulsion has been stated to be the smallest that will transform a *volens* into a *volens*. It is a hard law, where work is scarce, and where men have families dependent on them.

* * *

The Agricultural Holdings (Scotland) Act, 1883, Amendment Bill.—This measure, which has passed through both Houses of Parliament, effects a small but useful reform. The cumbrous and expensive character of the reference before two arbiters and an oversman, provided by the Act of 1883, has been a great hindrance to the satisfactory operation of the Act. What happened was what happens every day in sheep valuations and railway arbitrations. Each party appointed a partisan arbiter, the arbiters differed as a matter of course, and an oversman had to be called in. The expense of employing these skilled judges, and of rehearings, was generally out of all proportion to the amount at stake. Nor was this the only mischief attending the system. The appointment of oversman was always a matter of difficulty, and the arbiters were too often governed by wholly illegitimate considerations. The number of men who lay themselves out for work of this kind is comparatively limited, and the amount of giff-gaff which went on amongst them was not wholesome. We have known cases in which, before ever addressing themselves to their work, the arbiters have made a bargain that the one should have the patronage of appointing the clerk, the other of selecting the oversman. The measure of this session remedies this anomaly by making a sole arbiter the rule under the Act. No doubt the parties may still of mutual

consent have an old-fashioned arbitration, with two arbiters and an oversman. But in default of agreement to this effect, there is to be but one arbiter. If the parties do not concur in the matter, either party may apply to the Sheriff to appoint a sole arbiter. There is no doubt that this is a great improvement upon the former system. An arbitration so conducted will be much more economical; and an arbiter chosen by the parties mutually, or nominated by the Sheriff, will be a judge not a partisan.

* * *

Contempt of Court.—There has recently been so outrageous a disregard of decency in discussing and pronouncing on the matter at present under investigation by the Special Commission, that we are disposed almost to conclude that that learned and honourable body has resolved no longer to put in force its power to check such disreputable conduct, but to treat the offenders with the contempt of silence. So far as their own reputations and honour are concerned, the members constituting the Commission, it is needless to say, can well afford to ignore scurrility and innuendo alike. When obscure bailies rant in the plenitude of their might, and when newspapers of a marked neurotic temperament use bad language to the very select circle of their purchasers, people may well be content to smile. But in the interests of public decency, and in the interests of judicial independence and freedom, we humbly think the Special Commission would do well to put a stop to such attacks. It is the sense of impunity, and that alone, which has made these offenders valiant. Withdraw that feeling by a fine or two, and the attacks will cease.

* * *

Notarial Execution.—Upon this matter a solicitor writes: "I think there must be a misunderstanding between you and your correspondent signing himself 'Lex.' When you say that a notary cannot take infetment on an instrument prepared by himself, you of course mean that he cannot prepare and sign a notarial instrument in favour of himself; but I rather think your correspondent must imagine you to mean that a notary public cannot sign as notary a notarial instru-

ment in favour of a third party, if he (the notary) has drafted and his clerks have extended the instrument. Unless this is his meaning, I do not see how he could possibly say that your statement was not in accordance with the general understanding of the profession." We cannot speak with the same confidence of the practice as of the law. We have expressed a clear opinion that it is *ultra vires* of a notary to execute a notarial instrument in favour of himself, and we incline to think with our second correspondent, that this is the general understanding of the profession, and is acted on in practice.

Special Articles.

SMALL DEBT APPEALS.

A RULE which was once held as doubtful has been affirmed on three recent occasions, in cases all of which seem to have escaped the notice of the reporters. As every lawyer knows, Small Debt appeals can be taken only on certain special grounds, and there is no review on the merits either in questions of fact or of law. But one of the grounds of appeal is malice, and it has in three recent cases been held that when the Sheriff's judgment, though on a question of law, is in the face of it preposterous, this is constructive malice. In the first case, which occurred in Glasgow Circuit Court a couple of years ago, the Sheriff-Substitute had held that a landlord had lost his right to sue the tenant for rent because he had allowed the tenant to remove his furniture without availing himself of his hypothec. Lord Young quashed this decision as being "nonsense," and therefore constructive malice. The next case occurred last January at Dundee Circuit Court. In the face of a decision of the Court of Session that a son-in-law is not liable for his mother-in-law's aliment, the Sheriff-Substitute there granted aliment in Small Debt actions in these cases. An appeal was taken to the Circuit Court, but it was argued that however bad the Sheriff-Substitute's law might be, his judgment in law was not subject to review. Lord Young, however, held that it

was constructive malice on the part of the Sheriff to disregard a clearly ascertained rule of law. The third case occurred in March last at Glasgow Circuit Court. Some sailors deserted their ship in a Canadian port, and took service in a homeward bound Clyde boat. On their arrival home they sued the Clyde boat for their wages for the homeward voyage in a statutory action under the Merchant Shipping Acts. The owners of the ship they went out with did not appear, but nevertheless the owners of the vessel in which the sailors served the homeward voyage pleaded that under the Merchant Shipping Act the wages for the home voyage were forfeited by the desertion. The Sheriff-Substitute sustained this contention, and forfeited the wages *to the owners of the homeward ship*. There is no doubt that under the Act the wages for the home voyage might have been forfeited to the ship which the men deserted, had the owners of that ship claimed them; but it was, of course, quite unwarrantable and absurd to forfeit them to the owners of the homeward ship, who had profited by the desertion. The Merchant Shipping Act, 1854, sect. 542, allows review only on the grounds of corruption or malice; but Lords Rutherford Clark and Trayner had no difficulty in holding that the judgment of the Sheriff-Substitute in this case was so indefensible as to amount to constructive malice, and accordingly they set it aside.

CATTLE HORNING.

THE considered judgment of the Court of Queen's Bench upon this question was pronounced upon 18th May. The judges—Lord Chief-Justice Coleridge and Mr. Justice Hawkins—had no difficulty in holding that the practice is illegal. The charge was laid upon 12 and 13 Vict. c. 92, sect. 2, the Act for the Prevention of Cruelty to Animals, in which the important words are—"Any person who shall cause any animal to be cruelly abused, ill-used, or tortured shall be guilty of the offence of cruelty." In the course of his judgment the Lord Chief-Justice said: "The question is whether the operation of dishorning cattle, as it is proved to have been performed in this case, is justifiable. In deciding this ques-

tion, it is important to consider what is cruelty. The mere infliction of pain, and even of extreme pain, is not sufficient to constitute cruelty. Men constantly inflict pain on one another, or on the brute creation, for purposes of medicine or surgery, or under sanctions—as by way of punishment—which are lawful, and in such cases it may be reasonably necessary. What is necessary it may be difficult to define in affirmative words, but it may be possible to approach a definition in the negative. There can be no necessity to sell beasts for 30s. or 40s. more than might be otherwise obtained, or to enable the owners to pack a few more beasts in a yard or railway truck, or to prevent rare or occasional instances of fighting among the animals. These may be purposes of convenience or profit, but can hardly be considered as necessary. That without which the animals cannot obtain their due degree of development, or be fitted for ordinary use, may fairly come within the term ‘necessary,’ and if it is something to be done to the animal, it may be properly done. What is necessary, therefore, within these limits may, I should think, be done, even though it causes possibly extreme pain, but only where it is reasonably necessary to effect the result aimed at. Necessary pain, therefore, is limited to what may be fairly inflicted on animals over which we have assumed dominion. But I adopt the definition of cruelty given by Mr. Justice Wightman in one of the cases cited (*Budge v. Parsons*, 3 Best & Smith’s Reports, 382) as completely satisfactory,—‘the unnecessary abuse of the animal,’—language approved of by the Court in *Murphy v. Manning* (2 Law Reports, Exch. 307), and it is only expanded in the definition given by Mr. Justice Grove in a subsequent case—‘unnecessary ill-usage by which the animal substantially suffers.’ ‘Abuse’ means the infliction of substantial suffering; and ‘unnecessary’ means the infliction of such suffering without necessity, under which word I include any reasonable objects which require it.”

His Lordship then proceeded to inquire whether the operation was a necessary one, and he had no difficulty in arriving at the conclusion that it was not necessary. “Applying these observations to the present case, there can, I think, be no difficulty in coming to a conclusion. As to necessity,

it is found in the case that for twenty years this practice of dishorning cattle has been entirely disused throughout England and Wales. It has not been thought necessary in all that time to perform the operation on any of the millions of cattle which the farmers of England have reared and sold. We learn from the case in the Scotch Court of Session that the practice has only prevailed in three counties in Scotland, and is unknown in the others. It appears that in Ireland the practice is more common. It is incredible to me that an operation for many years wholly discontinued in England and Wales, and in Scotland except in three counties, can have become necessary so as to except it from the general words of the statute. It is not merely unknown in many districts, but it has been discontinued in others. And upon the evidence no ground for it was suggested, except that the animals generally after dishorning sell for a little more money, and that more of them can be packed into a yard or truck, and that the dishorned animals cannot gore, but can only butt."

His Lordship then proceeded to examine and review the evidence tending to show that the operation is a cruel one, and inflicts great pain upon the animals on which it is inflicted. The language which his Lordship used in describing it is by no means measured. "What, however, is the evidence as to the practice which the magistrates have sanctioned and which we are asked to countenance? It is utterly disgusting; but in the interests of our common humanity it must be read. It must be read, also, because I do not believe that evidence, uncontradicted, of cruelty so detestable and brutal can have been given in the cases of the Scotch and Irish Courts relied upon as showing that the practice is legal, and which no doubt may appear to be inconsistent with our judgment."

His Lordship then read the evidence at length, and he laid particular stress upon the evidence of the veterinary surgeons as to the excruciating torture inflicted upon the animals in the operation, and its continuance for weeks afterwards, and also as to its not being necessary to prevent the animals from goring each other, as the cutting off of two inches at the tip
of the horns, where the horns are not sensitive to pain, equally

answers the purpose. For the defence it was not denied that the operation causes great pain. Mr. Clare Sewell Read said : " The operation causes the animals very severe pain, but it makes them more valuable ; it is not possible otherwise to put thirteen bullocks in a yard twenty-five feet square. It is cruel at first, but it is kind afterwards, as the buyers pay more for the beasts ! "

" Now," proceeded the Lord Chief-Justice, " against all this there was absolutely no evidence, except that beasts in Norfolk occasionally gored each other. But in England and Wales (except in Norfolk) we see the cattle grazing on the farms or standing in the yards, armed or ornamented by their horns, in perfect peace and ease. The evidence for the defence—such as it is—was directed not so much to deny the horrible suffering inflicted, as to justify it on the grounds suggested. I do not doubt that the dishorned beasts sell for a little more than the others. I suppose that the same space may contain more dishorned beasts than horned ; and there is reason to believe that the operation disguises the age of the animals, and is sometimes made the means of deceiving purchasers. But I deny that any or all of these reasons are sufficient to constitute a necessity for the operation or to justify it. Necessity, to constitute an excuse under the Act, does not mean simply that the object of the operation cannot be otherwise secured. There must be some proportion between the object and the means. The mutilation of horses and bulls is necessary, if properly performed, and so is lawful, because without it the animals could not be kept. But to put thousands of cows or oxen to the hideous tortures described in the evidence in order to put a few pounds more into the pockets of their owners, is an instance of utter disproportion between the results and the practice described,—is barbarous and unlawful."

Turning from the facts of the case to a consideration of the case law of the matter, his Lordship reviewed the various decisions, and noticed the Scottish and Irish cases. In this connection it may be noted that cattle horning has been held not to be cruelty within the meaning of the statute, both by the High Court of Justiciary and by the Irish Court of Queen's Bench ; whilst, on the other hand, it was held to be

illegal by the Irish Court of Exchequer. Again, the operation of sow-spaying was held by the English Court of Queen's Bench not cruelty, if performed in the *bona fide* belief that it served a useful purpose, although, as a matter of fact, it was a useless operation. This decision was followed in the Scots cattle-horning case, but it seems that, in the opinion of Mr. Justice Hawkins, it was a bad judgment, and it was virtually disregarded by the Court in the present case.

On these cases the Lord Chief-Justice said : " It remains to say a few words as to the cases. The case already cited (*Murphy v. Manning*) I desire to follow and to rest upon, agreeing as I do both with the decision and the reasons. And in one of the Irish cases (*Brady v. M'Argle*, 14 L. R. Irish 174), the judgment of Mr. Justice Dowse states in better language than I could do what is the true test of cruelty. As to the other Irish case (*Callaghan*, 16 L. R. Irish 325), and as to the Scotch case (*Renton v. Wilson*, 15 R. 84), no English lawyer can fail to regard the decisions of the Courts in Ireland and Scotland with unfeigned respect ; but we have not the evidence set out in detail, and I do not say that if I had been in their places I might not have arrived at the same conclusion on the facts before them, but I doubt whether, if they had heard all the evidence before us in the present case, they could possibly have arrived at any other conclusion than that to which we have come. I cannot believe that with such evidence as that before them, Chief-Justice Morris could have said in the Irish case, that the pain caused by dishorning was 'only temporary,' and that there was a reasonable necessity for it, or that Lord Young could have said in the Scotch case that the statute was never 'meant to interfere with the reasonable judgment of those who were pursuing their own business.' As to the recent decision in the case of *Lewis* (18 Q. B. 532), in the Queen's Bench Division, it was upon a different operation, open to other considerations ; but if my brother Hawkins is right in the view he has taken of the reasoning of that case, I dissent from it, and concur in the observations he has made upon the case. For these reasons I have come to the conclusion that the magistrates ought to have convicted the defendant, and

that the case must be remitted to them to deal with it in accordance with what we hold to be the law."

Mr. Justice Hawkins followed the Chief-Justice, and delivered a judgment of even more emphatic and indignant condemnation of this barbarous practice.

"Any one," he said, "who could read the description of this operation, and reflect for a moment upon the agony of the poor mutilated creatures, without being painfully touched with commiseration, must be devoid of all pity for the miseries and distresses of God's creatures; and he who could willingly inflict such suffering, unless under the direst necessity, must be indeed cruel in heart and insensible to every dictate of humanity. What amounts to a necessity or good reason for inflicting suffering upon animals protected by the statute is hardly capable of satisfactory definition. Each case must depend upon a variety of circumstances. The amount of pain caused, the intensity and duration of the suffering, and the object sought to be attained, must, however, always be essential elements for consideration. To attain one object, the infliction of more pain may be justified than would ever be tolerated to secure another. It would not be contended by the strongest advocates of the cause of humanity, that pain to some extent may not be reasonably inflicted, with a view to save an animal's life, to cure it from sickness or injury, or to fit it to fulfil the part for which by common consent it is designed. In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted unless necessity for its infliction can reasonably be said to exist."

In the opinion of Mr. Justice Hawkins, agreeing with that of the Chief-Justice, an operation although painful is justifiable, if it be absolutely necessary, and in some cases even though not absolutely necessary, if the pain be not out of proportion to the benefit, as in the case of tipping a lamb's tail. "The nature of the operation and the pain caused thereby must not so far outbalance the importance of the end, as to make it clear to any reasonable mind that it is better that the object should be abandoned, rather than that the suffering should be inflicted."

Mr. Justice Hawkins next proceeded to inquire whether the operation here in question came within either of the categories he had indicated,—whether the necessity or urgency of the matter were such that it justified such an operation “that one shuddered to think that men could be found to perform it.” He was satisfied that no such necessity or urgency existed. “No one was compelled by any necessity thus to turn his horned cattle into dishorned, or to put into the same yard the same number of horned cattle as he would dishorned. If he wished to have polled cattle he could buy such as were naturally polled; and if he prefers to buy horned cattle, and then to enhance their value a few shillings by mutilating them so as to cause the poor animals excruciating torture, how could this be said to be necessary or reasonable? Throughout vast districts both in England and Scotland, thousands upon thousands of horned cattle are to be seen herding together peacefully enough, grazing in the same fields, confined in the same yards, feeding and fattening together, and packed together in railway trucks for transportation to cattle markets. It may be that occasionally one of these animals may give a little more trouble than the rest, but the farmers, graziers, and dealers throughout England, except Norfolk,—gentlemen quite as alive to their own interests as those who have adopted this cruel practice,—have not for years attempted to adopt it as a remedy for such occasional inconveniences. This was abundant evidence that the operation was not necessary, and that “tipping” or “knobbing” had been found to be practically sufficient. And it must not be forgotten that the Highland Agricultural Society, fifteen years ago, denounced the operation as a cruel practice, and still condemned it.”

His Lordship then examined the cases bearing upon this matter, and expressed his dissent from the *dicta* of the judges in *Lewis v. Fremor* (18 Q. B. 532), the sow-spaying case, where the Court held that an honest belief that the act was justified constituted a defence. The Scottish case he noticed last, and he concluded his opinion with a powerful exposition of the principles upon which his judgment was based.

“In the Scotch case, *Renton v. Wilson* (15 R. Just. 84), which was a case of dishorning, the Court held it not a case of cruelty, on the ground that ‘the Act does not

interfere with the judgment of those who are pursuing their own affairs,' etc. I cannot give my assent to that decision, or recognise in the views expressed in these cases anything which can excuse the infliction of such extreme suffering. If the law were that any man could, in his interests, or for his pecuniary benefit, cause torture and suffering to animals without legitimate reason, and could excuse himself upon the ground of an honest belief that the law justified him, it is difficult to see the limits to which such a principle might not be pushed, and the creatures it is man's duty to protect from abuse would oftentimes be suffering victims of gross ignorance and cupidity. In this case it appeared that the operation was performed indiscriminately upon whole herds of cattle at a time, without regard to age, habits, or tempers, and not because any of them have shown themselves to be dangerous, or exhibited the least trace of temper or unruliness, but because possibly hereafter in some feeding-yard some one or more of them may turn out to be troublesome, and because the operation may for some reason or other add a few shillings to their price when sold. The animals thus operated upon each year may amount in numbers to tens of thousands. Constant familiarity with unnecessary torture and abuse of dumb animals cannot fail by degrees to brutalize and harden all who are concerned in or witness the sufferings inflicted. From what I have said, it follows that in my opinion the practice of dishorning is a cruel, unreasonable, and unnecessary abuse of the animals operated upon, and therefore that it is illegal and ought to be suppressed, and that the magistrates ought to have convicted the defendant."

We make an apology for the number and the copiousness of the extracts which we have given from these remarkable opinions, which are sure to have a powerful influence both upon public opinion and upon the future development of the law in the matter. With the opinions themselves, and the result arrived at, we most cordially concur. The opinion of the Scottish judges—that the cruelty must be wanton, that the Court is not to inquire whether the operation be useful if a *bona fide* belief exist that it is so—would really nullify the statute. The man who drives a horse with a sore, does not do so wantonly. He does so because he has work he

wants done, and no other horse to do it. So of the man who hangs the calf up by the heels, and lets it bleed slowly to death, to make the flesh white; and so, too, even of the man who skins the cat alive, in the belief that the fur will thereby be rendered more glossy. These acts of cruelty are not inflicted out of pure malice, they are done in the *bona fide* belief that they serve a useful purpose. But the men who perpetrate them are not the less monsters, and are properly made amenable to the criminal law. It is probably impossible now for the High Court to go back upon its decision. But Parliament may intervene, and, in the light of the judgment of the Court of Queen's Bench, there ought to be little difficulty in passing a measure declaratory that the practice is illegal in all three kingdoms. It is indeed melancholy that such intervention should be necessary. The men who are guilty of this inhuman savagery are not roughs from the dregs of society, but respectable Fifeshire and Forfarshire farmers, who go regularly to church, and profess to look for that mercy which has been promised to the merciful.

PROFESSIONAL ETHICS.

IF some one has not said it, then we have dreamed some one has, that were a careful analysis of jests to be made, the ordinary stock-in-trade of the jester would be found to be surprisingly small. Four or five threadbare themes, unless we are mistaken, would exhaust the stock. There are marriage, mothers-in-law, Scottish thrift, borrower and lender, and the knavery of lawyers,—that is about all. The last of these is, alas! not the least. In succeeding generations the traditional character of an attorney has been a mine of matter to the concocter of jests. No one figures more largely in the "Varieties" and "Miscellaneous" columns of our local newspapers than does the man of law; and in American (so-called) "humour" he has always had a conspicuous, if somewhat monotonous, place. On the stage, and in the novel, which, after the newspaper, most impress and inform the public mind, the lawyer is generally the grasping and unscrupulous gentleman who needs to be narrowly watched.

Now this reputation distresses us. Sensitive as we are to all that affects the fair fame of the profession, this preys on our happiness. Can nothing be done to correct so erroneous a conception? Shall we not set agoing a series of testimonials and banquets in our own honour; and further the erection of monuments to the integrity of our conduct and the transparent purity of our motives? Ought not pictures to be painted, and poets and novelists be hired to write, to tell a flattering story of our uprightness as a profession? These means would fail. We must begin further back; we must reform our conduct. What course of conduct is it necessary to adopt if lawyers are to be honest and honourable men,—not from the absolute moral standpoint, for that, we believe, they are already, as mere human nature goes,—but honest and honourable in the sight of unsuccessful clients, defeated opponents, jealous rivals, the indiscriminating public, and the mechanical manufacturer of jests?

The Richmond Bar Association, in Virginia, has solved the problem. It has drawn up "A Code of Ethics." The Code is to be submitted for the consideration and approval of the Association. Now, "A Code of Ethics" is a wide term. It means a system of rules for the regulation in morals of the entire conduct of man in all his relations—domestic, social, professional, civic, religious. The Richmond Code, however, does not go so far. Its title is more pretentious than its scope. The Code is restricted to the professional conduct of its members. It does not purport to teach you how to be a model husband, or father, or uncle, or aunt, a perfect citizen, or even a shining light in religion, but merely points the way to be what, according to ribald public opinion, is so rare—an honest lawyer.

In fifty-two elegantly expressed rules and a fine preamble, is set forth the entire duty of attorneys to Courts and judicial officers as well as to each other, their clients, and the public. Hitherto unwritten etiquette and the outcome of professional good-feeling have at length found articulate expression. This is from the preface:—"No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the

light of conscience, and the conduct of honourable and distinguished attorneys in similar cases, and by analogy to the duties enjoined by statute, and the rules of good neighbourhood." The "Code," notwithstanding this chilling generality, proceeds to table its fifty-two rules. Early in the Code the Richmond Bar Association faces our problem. Rule 9 thus enjoins:—"An attorney should not speak slightly or disparagingly of his profession, or pander in any way to unjust popular prejudices against it; and he should scrupulously refrain at all times, and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney." Rule 10 follows in the same direction:—"Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim often set up by the unscrupulous in defence of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause." The Code goes boldly on:—

"11. Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

"12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, forswears himself. The State's attorney is criminal if he presses for a conviction, when, upon the evidence, he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle prosequi*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

"13. An attorney cannot reject the defence of a person accused of a criminal offence, because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defences as the law of the land permits, to the end that no one may be deprived of life or liberty but by due process of law.

"14. An attorney must decline in a civil cause to conduct

a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

"15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

"16. Newspaper advertisements, circulars, and business cards, tendering professional services to the general public, are proper; *but special solicitation of particular individuals to become clients is disreputable*. Indirect advertisement for business, by furnishing or inspiring editorials or press notices regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.

"17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the Courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.

"18. When an attorney is a witness for his client, except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in Court in behalf of his client as to any matter.

"19. Assertions, sometimes made by counsel in argument, of a personal belief of the client's innocence or the justice of his cause, are to be discouraged.

"20. It is indecent to hunt up defects in titles, and the like, and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavour to get a fee to litigate about it. Except where ties of blood, relationship, or trust make it an attorney's duty, it is unprofessional to volunteer advice to bring a lawsuit. Stirring up strife and litigation is forbidden by law, and disreputable in morals.

"21. Communications and confidence between client and

attorney are the property and secrets of the client, and cannot be divulged except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

"22. The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client's interests in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material in a subsequent suit, as the basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such cause without the consent of his former client.

"23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause, where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere scrivener, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the laws, he may assail it on that ground in suits between third persons, or between parties to the instrument and strangers.

"24. An attorney openly, and in his true character, may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the Government, upon the same principles of ethics which justify his appearance before the Courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

"25. An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then, such a position is embarrassing, and ought to be avoided. An attorney represents conflicting interests, within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

"26. It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to

be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified.

" 27. An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the attorney's conscience in professional matters. He cannot demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself whether such a course is essential to the ends of justice, and therefore justifiable.

" 28. Clients, and not their attorneys, are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanour to each other, or to suitors in the case.

" 29. In the conduct of litigation and the trial of causes the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honourable opponent.

" 30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day, to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honour and propriety; and, if such a course is insisted on, the attorney should retire from the cause.

" 31. The miscarriage to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

“ 32. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

“ 33. An attorney is in honour bound to disclose to the client at the time of retainer all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.

“ 34. An attorney should endeavour to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

“ 35. Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

“ 36. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject-matter of the litigation, so long as the relation of attorney and client continues.

“ 37. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but, after advising frankly with the client, it should be left to his determination.

“ 38. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonourable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of Court.

“ 39. An attorney should not ignore known customs or practice of the Bar of a particular Court, even when the law permits, without giving opposing counsel timely notice.

“ 40. An attorney should not attempt to compromise with the opposite party without notifying his attorney, if practicable.

"41. When attorneys jointly associated in a cause cannot agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively, in which event it is his duty to ask to be discharged.

"42. When an attorney has been employed in a cause, no other attorney should accept employment as his associate without previously ascertaining that his employment is agreeable to the attorney first employed.

"43. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney.

"44. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset as to the amount of the attorney's compensation; and, where it is possible, this should always be agreed on in advance.

"45. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law-suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud."

So much for an example of the Code. It may do much to correct the false conception of the legal practitioner now entertained by the jest-maker. We fear, however, that if the lawyer is to enjoy popularity and escape abuse there are still some rules to be added for his guidance,—rules which we fail to find in this interesting book of discipline of the gentlemen of the Richmond Bar. It were presumption to pretend to detail these here. Perhaps, however, an example or two of the kind of injunction required may be offered in all humility without offence. If, then, the practitioner is to shun abuse, these few precepts must be observed. *First*—As between lawyer and client—(1) The lawyer must on no account be unsuccessful in any action, for the client will not hold him guiltless if he is. Looking to this undoubted fact, it behoves judges, who are themselves lawyers, to consider the reputation of their professional brethren, and they ought

accordingly never to decide a case against any party. (2) The lawyer ought never to charge anything, either for services or outlays. He ought to keep a staff of clerks (and pay them); he ought to have a comfortable office for his clients (and pay the rent thereof and taxes thereon); he ought to give up his time cheerfully to his clients, to sacrifice his holidays; but he must on no account make any charge. And so forth. Any practitioner can carry out these ideas for himself as explicitly as the Richmond Bar Association. If he does, and acts up to them scrupulously and manfully and without turning back, he will rise in public esteem as no lawyer has ever risen before, and he will rob the jest-maker of one of his richest and best worked mines of mirth.

THE RESPONSIBILITIES OF HIRERS, BORROWERS, AND CUSTODIERS OF HORSES.

As the case of *Bain v. Strang*, 6th December 1888, 16 R. 186, has again raised the question of the liabilities of persons having the control of horses which belong to others, an attempt to set forth as tersely as possible the rules which seem to guide the various decisions on the point may not be uninteresting. Persons having the lawful control of horses not belonging to themselves may be divided into three classes, viz. hirers, borrowers, and custodiers generally; but in the matter of the treatment of the animal, all these classes are bound by the same obligations. The Roman law indeed drew a distinction between the contracts of hiring and borrowing in regard to the negligence necessary to found liability for damage. It held that a borrower, acting under a gratuitous contract, was liable for *culpa levissima*, while a hirer, acting under a contract giving mutual benefit to both lessor and lessee, was liable only for *culpa levis*. The difference between *culpa levis* and *culpa levissima* is, however, very difficult to define in practice; and in the cases on the present subject which have come before our own Courts, no distinction has been drawn between the liabilities of hirers and borrowers. To quote Lord Gifford in the case of *Wilson v. Orr*, 22nd November 1879, 7 R. 266, the burden which lies on the hirer lies upon all parties

who under "any other contract get the entire use, custody, and control of another person's property."

The obligations laid upon every hirer, borrower, or custodier of horses are two:—(1) To take reasonable care of the animal, and (2) not to make any use of it outwith the limits of the contract. If he has fulfilled both these obligations, and the horse is injured or dies while under his control, no liability for damage attaches to him; and the owner must bear the loss or injury without recourse, in accordance with the rule, *res perit suo domino*. But there lies upon the hirer, etc., an *onus probandi* that he did fulfil these obligations.

The first obligation is to take reasonable care of the horse. Reasonable care is such care "as a diligent and prudent man takes of his own property" (Bell's Com. i. 488). The following decisions may be cited in illustration of this definition. In the case of *M'Lean v. W'arnock*, 28th June 1883, 10 R. 1052, a horse sent to be grazed on a farm for hire, was placed in a field situated over some old mineral workings. It fell into a hole in the field, and was killed. The farmer denied knowledge of the existence of the hole, but it was held that it was his duty "to have this field examined periodically to see whether it was in a safe condition for the grazing of horses," and that he, not having done this, had failed to exercise toward the property placed in his custody that reasonable care which a prudent man would have taken of his own. And in the case of *Pullars v. Walker*, 13th July 1858, 20 D. 1238, an intending purchaser was held liable for the value of a horse which had been sent to him on trial, it having died while under his control from the effects of "extra work of a severe kind, which, although it might not be more severe than other horses are occasionally put to and could do, it may be, with reasonable safety, must always be attended with some risk, more or less, even to a well-trained and completely seasoned horse."

The hirer, borrower, or custodier will not free himself from liability for the death or injury of the horse by merely asserting that he took all reasonable care of the animal. As already stated, something more is required. There lies upon him an *onus probandi* that he did take such care. There are various modes of discharging this *onus*. The most complete mode is for him to prove by direct evidence the specific manner in

which the injury was sustained, the specific cause of the injury, and that he was not to blame. Thus in *Pyper v. Thomson*, 4th February 1843, 5 D. 498, a horse hired out for a drive backed over the quay into the harbour at Aberdeen, and injured both itself and the gig to which it was harnessed. The proof showed that when the horse began to back, the hirer had jumped out of the gig, and, along with a friend and other bystanders, had endeavoured to lead the horse forward. In this action, raised by the owner for reparation, the hirer was assolizied, it being held that the accident happened simply because the horse took an obstinate fit of backing, and that the hirer was not to blame.

The circumstances of the case, however, are often such that direct evidence concerning the specific cause of the injury, and the specific manner in which it happened, cannot be got. In cases of this kind, it has been held to be enough if the hirer, etc., leads such evidence as is attainable, in the circumstances, in support of his assertion, that he used reasonable care, and further maintains his contention by proof of a cause or causes which might have occasioned the injury without fault on his part, and for which he is not responsible. In the case of *Bain (supra)*, a borrowed horse, while being driven by the borrower along a road, fell, and received serious injuries. The borrower, and a friend who was beside him in the trap, gave evidence that reasonable care was being taken of the horse at the time of the accident. Proof was also led on behalf of the borrower, showing that the horse suffered from chronic weakness of the foreparts, and had also suffered at various times from bad shoeing. In the action raised by the owner for reparation, the Court found it proved that the borrower had observed reasonable care in using the horse, and that the injury had not been caused by his fault, and they therefore assolizied him from the conclusions of the summons.

If the facts of the case are adverse to the theory that reasonable care was taken of the horse, mere assertion on the part of the hirer that he did use such care will avail him little. Thus, in the case of *Robertson v. Oyle*, 23rd June 1809, F.C., a horse fit for any ordinary journey was, while in possession of the hirer, found to have been strained over the knees by over-riding or bad usage, and thus rendered useless

for further service. A veterinary surgeon, to whom the Court remitted the case, reported that in his opinion the injury was not the consequence of hard labour or bad usage previous to the time at which the horse was hired by the defender. In the circumstances, the Court held the defender liable for the injury. The case of *Wilson (supra)* is also in point. A horse hired out by a postmaster to a farmer for its keep, and to all appearance sound when delivered to the latter, was found one morning suffering from a festering shoulder. The horse died within ten days thereafter. The veterinary surgeon who had examined it gave evidence that the injury was caused by a severe blow from some hard substance, which must have been received after the date of the delivery of the horse to the farmer. In these circumstances, the Court thought "it lay upon the defender to do a great deal more than merely to say, 'I cannot tell how the injury was received, but it was not owing to any fault in me or in my servants,' " and found him liable for the value of the horse.

The second obligation on the hirer, borrower, or custodier of a horse is to make no use of it outwith the limits of their respective contracts. Thus a man who receives the horse of another for grazing purposes, is not entitled to work it himself or hire it out to a third party. If the contract itself has conditions expressed or implied, these must not be overstepped. In the case of *Seton v. Paterson*, 9th December 1880, 8 R. 236, a riding horse hired for a day's ride, while being galloped in a grass field by the hirer, split its pastern bone. It was confined on this account to the stable, and during its confinement died of inflammation of the bowels. The proof showed that the owner had three rates of charges for hiring out horses,—one for ordinary road riding, another for military purposes, and a third for hunting,—and that in this case the horse had been hired at the ordinary rate. The owner was found entitled to the value of the horse, the Lord Justice-Clerk (Moncreiff) remarking, that "to take a horse, which has been hired for a ride along the road, into a grass field and gallop it there, is to go beyond the implied conditions of the contract on which the horse was hired."

If the hirer, borrower, or custodier does not fulfil the conditions of his contract, then, in the opinion of Lord Neaves

(*Pullars, supra*, p. 1241), there seems good ground for holding it to be the law that "he transfers the risk to himself without the necessity of proving any connection between the misconduct and the event. He seems thus to make the article his own when he uses it as his own without regard to the conditions on which he holds it." This at least is certain, that if he neglects to fulfil his obligations, and an injury happens to the horse, there lies on him an *onus probandi* that the horse *must have perished* from a cause unconnected with the misuse, and this *onus* he must discharge if he would free himself from liability for the injury.

If the injury to the horse happens in consequence of the failure of the hirer, etc., to fulfil his obligations, it does not make any difference that the injury followed from the misuse in an indirect manner. In such circumstances the hirer is equally liable as if the misuse was the direct cause of the injury. Thus in the case of *Pullars (supra)*, the direct cause of the horse's death was inflammation of the intestines; but it was held that the overworking probably impaired the digestion, and either of itself, or in concurrence with other causes, brought on the inflammation which proved fatal. Decree was therefore pronounced against the defender for the value of the horse. Again, in the case of *Seton (supra)*, during a departure by the hirer from the implied conditions of the contract, the horse's pastern bone was broken, and the horse died from inflammation of the bowels. There thus seems little connection between the misuse and the death. But the misuse had caused the horse to be confined to the stable, without exercise, and it was held that a horse so confined, and under treatment, was more likely to take inflammation. The hirer was therefore found to have made himself liable for the animal's death.

Appointments.

LORD WELLWOOD has been appointed Lord Ordinary in Exchequer Cases in room of the late Lord Fraser.

MR. ALEXANDER LOW, advocate (1870), has been appointed *interim* Sheriff of Fife and Kinross during the absence of the

Sheriff, Mr. Æneas Mackay, who, we greatly regret to learn, is in bad health, and has been obliged to obtain leave of absence from the duties of his Sheriffship.

THE RIGHT HONOURABLE J. B. BALFOUR, Q.C., M.P., was, at a meeting of the Faculty of Advocates, held on the 22nd May, unanimously elected Dean of the Faculty. This is the second occasion on which Mr. Balfour has been chosen Dean by his brethren of the Bar. He held the office from 11th July 1885 till 16th February 1886, when he vacated it on becoming Lord Advocate for the second time. Mr. Balfour was admitted to the Faculty in 1861. He was Solicitor-General from 1880 till 1881; Lord Advocate from 1881 till 1885, and again in 1886 from January till July. So far, as we have been able to ascertain, there has been no previous instance of a re-election to the office of Dean.

MR. R. T. YOUNGER, M.A., LL.B., advocate (1885), has been appointed Lecturer in Constitutional Law and History in the University of Glasgow, in room of Mr. A. Ure, advocate, who resigned some months ago.

Obituary.

MR. HENRY BRET INCE, Q.C., died very suddenly at his chambers on the 7th May. The learned gentleman argued a case before Mr. Justice Kay during the day, and had just concluded a consultation in the evening, when he became unconscious, and died in the course of a few hours. Mr. Ince, who was in his fifty-ninth year, was in early life a Parliamentary reporter. He was called to the Bar (Inner Temple) in 1852. Subsequently he changed to Lincoln's Inn. He took silk in 1875. Having sat as M.P. for Hastings in the Liberal interest from 1883 till 1885, he was at the election in the latter year returned for East Islington. As a Gladstonian, Mr. Ince was defeated at the General Election in 1886. The deceased gentleman was remarkable for the quickness of his apprehension and his ingenious pleading.

MR. JOHN KIRK, W.S., Edinburgh, Director of Chancery, died at Wynberg, South Africa, on the 27th April. He had taken a voyage to the Cape in the interest of his health. While there he contracted typhoid fever, to which he succumbed. Mr. Kirk was a native of Edinburgh, and was educated at Edinburgh University. He was admitted to the Society of Writers to the Signet in 1849. Originally a partner in the firm of Adam, Kirk, & Robertson, W.S., he in 1878 became a member of that of Hope, Mann, & Kirk. Mr. Kirk was appointed Director of Chancery in 1874.

MR. WM. MILLER, S.S.C., Edinburgh, died at Skelmorlie on 27th April, aged 67. Mr. Miller was admitted a Member of the Society of Solicitors before the Supreme Courts in 1846, and was at one time its President. He was a Fellow of the Royal Society of Edinburgh, and a Member of the Scottish Antiquarian Society; and was the author of several literary works.

MR. JOHN MUIRHEAD, solicitor in Stirling, died on 1st May.

MR. D. PEARSON, Kirkcaldy, the last surviving partner in the well-known firm of Messrs. D. & D. Pearson, solicitors in that town, died on 13th May. In addition to carrying on his private practice, Mr. Pearson acted for some years as Procurator-Fiscal at Burntisland.

The Month.

The Court of Session.—The Court of Session resumed its sittings on Tuesday, 14th May, after a Spring vacation longer than usual by two days. The ordinary date for beginning the summer session is the 12th May; but on this occasion the said 12th fell on a Sunday, and accordingly, as the Monday of each week is always a *dies non*, the reassembling of the Court was perforce postponed until the 14th. Nor were the lawyers too hard put to it all at once. Whitsunday term, on the 15th, occurred opportunely to rest them after only one day's arduous bour. Then, too, the official celebration of Her Majesty's

Birthday, on the 25th May, limited the sittings of the Court in the second week of the session to four days.

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The Bench.—It was very gratifying to see Lord Shand and Lord M'Laren in their places again, and each looking so well after their long absence. Lord Mure had not yet returned ; but we understand that his Lordship has already much improved in health.

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The new Lord Ordinary.—On the morning when the Court resumed its sittings, there was more than the usual amount of bustle. A large muster of " the general public," and of ladies, showed that there was something less uninteresting in the business afoot than the mere routine of getting things in train again for the work of another session. The Lord Probationer (Mr. W. Mackintosh, Q.C., Dean of Faculty) presented his commission to the Court, went through his trials in due and time-honoured form, and ascended the bench as Lord Kyllachy. His Lordship takes this courtesy title from the name of his estate in the county of Inverness. Meanwhile clerks, macers, reporters, and the miscellaneous crowd of people who aimlessly stand reading the Court rolls, are conjecturing and disputing as to the pronunciation and accentuation of the title. Lord Wellwood has had a phenomenally brief career as Junior Lord Ordinary.

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Lords Ordinary's Blank Days.—The blank days of respective Lords Ordinary, as re-arranged, are as follows :—Lord M'Laren, Tuesday ; Lord Kinnear, Wednesday ; Lord Trayner, Saturday ; Lord Wellwood, Thursday ; and Lord Kyllachy, Friday.

* *

Licensing.—The magistrates of the county of Forfar in Quarter Sessions have reversed the decision of the Arbroath district magistrates which we mentioned last month, and have held that the local magistrates have no power to grant an extension of hours beyond 10 o'clock for the summer months, where the magistrates in Quarter Sessions have made a general rule for the county.

Marriage with Deceased Wife's Sister.—What has come to be an annual event, a debate on the subject of marriage with the sister of a deceased wife, took place in the House of Lords on 9th May, when the Duke of St. Albans moved the second reading of a Bill which proposed to legalize such marriages. The Bill was lost, as usual,—though only by a majority of 27 in a large House,—but the debate was of higher quality than usual. It must be owned that feeling in favour of such a measure is spreading in the country, or is, at least, finding more general expression. A Bill in the same terms was carried in the House of Commons last session by a majority of 53; and in the speech of the noble Duke who moved the proposal in the House of Lords, facts and statistics were given to show this growth of support. The measure proposed to enact that no marriage should be void or voidable by reason of a woman being the sister of a deceased wife. It was, of course, to be retrospective in its effect; but all legal rights which had accrued under the present system were to be saved, and any confusion as to succession was to be carefully guarded against. There was, too, a provision that no clergyman having conscientious scruples should be required to celebrate marriages of the kind. In the course of a very thoughtful and able speech against the Bill, Lord Percy referred to the absence of all indication of the principle which the supporters of the measure were of opinion ought to govern the legislation of this country with regard to the marriage law. They were told they were not to base the marriage law upon the declaration which ran through the whole of Scripture; nor upon the practically unanimous voice of the Church for 1800 years; nor upon the example of the Roman law; nor upon the Napoleonic code. He thought they had a right to demand some comprehensible reason why they proposed to include this relationship of affinity in the Bill, while they would still exclude thirty-nine other relationships of affinity.



The Court of Session Clerks Bill.—The Bill introduced in the House of Commons by the Lord Advocate and the Solicitor-General for Scotland, to regulate the number and duties of the Clerks of the Court of Session and Bill Chamber in Scotland,

and for other purposes, was issued last month. It provides that the vacancies at present existing in the offices of Principal Clerk of Session shall not be filled up, that the office of interim Principal Clerk of Session shall cease, and that there shall be only two Principal Clerks of the Court of Session, who are to be vested, subject to the orders of the Lord President of the Court, with a general supervision over the whole staff of clerks in the Inner and Outer House and Bill Chamber. No vacancy in the office of Assistant Clerk in the Inner House is to be filled up until the number shall have fallen to one, and thereafter there are to be two Assistant Clerks, one for each division of the Court, who will be termed Inner House Depute Clerks. There are provisions for transferring a portion of the work at present falling upon the Clerks of the Court of the Junior Lord Ordinary to the Clerks of the Bill Chamber. The sole remuneration of the Clerks of Court to be their fixed salaries, and fees that it has been the custom to charge are in future to be exacted only when sanctioned by the Lord Advocate, with the approval of the Commissioners of the Treasury. There are one or two exceptions to this rule, however, as in the case of election petitions. Appointment to certain offices is now to be vested in the Crown. No person hereafter appointed to any office in the Court of Session or Bill Chamber is to be entitled to superannuation unless he has been admitted to his office with a certificate from the Civil Service Commissioners, or holds his appointment directly from the Crown, but it is to be in the power of the Treasury to grant superannuation to persons serving in the said Court or Chamber at the date of the passing of the Act. Among the other provisions of the Bill is one relating to fees payable in maritime and consistorial causes, and the last names the 1st of October this year as the date when the new Act is to come into force.

* * *

"AN eminent judge of this State," writes the *Albany Law Journal*, "encloses to us the following extract from Wyche's Practice, edition of 1794, page 5: 'There is now no distinction of dress observed by either the judges or the gentlemen at the Bar, though by the rule of the January Term,

1765, abrogated only by custom, counsel are to be habited in the Bar gown and band used by the English barristers;’ and asks if we can guess where the rule therein referred to may be found. We cannot find any reference to it in Judge Folger’s Scrap-book, and so we give it up. Perhaps some of our readers can tell. Was there not a recent learned article on ‘Gowns’ in the *Scottish Journal of Jurisprudence* ? ”



THE following is the text of the Agricultural Holdings (Scotland) Act, 1883, Amendment Bill, on which we comment elsewhere. The Bill has now passed through both Houses of Parliament, and will probably receive the Royal assent after we go to press :—

“ A Bill intituled an Act to Amend the Agricultural Holdings (Scotland) Act, 1883.

“ Be it enacted, etc.,—

“ 1. This Act may be cited as the Agricultural Holdings (Scotland) Act, 1889, and shall be read as part of the Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. c. 62), hereinafter called the principal Act.

“ 2. Section 9 of the principal Act is hereby repealed, and in place thereof it is enacted as follows :—

“ Where there is a reference under this Act, unless the parties otherwise agree, as hereinafter provided, a single referee shall be appointed as follows :—

“ (1) Such referee shall, if the parties concur, be appointed by them jointly; and in any other case by the Sheriff, as hereinafter provided.

“ (2) If, before an award is pronounced, the referee dies or becomes incapable of acting, or from seven days after notice from the parties of his appointment he fails to accept the reference or to act, the proceedings shall begin afresh as if no referee had been appointed.

“ (3) If the parties concur, each may appoint a referee, and the referees so appointed may appoint an oversman.

“ (4) If at the determination of the tenancy the parties shall not have appointed a referee or referees,

then, on the application of either party, the Sheriff shall within two days appoint a competent and impartial person to be referee; and the powers of the Sheriff under this sub-section shall be exerciseable by him, although he may not be at the time within the country.

“(5) Every appointment and notice under this section shall be in writing.

“3. Section 10 of the Principal Act is hereby repealed.”

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Private Bill Legislation.—The following, with which we have been favoured, is the text of a report of the Executive Sub-Committee of the Committee of Public Bodies and Persons in Scotland interested in Private Bill Legislation:—

EDINBURGH, 22nd April 1889.

This Committee, which was formed on 30th November 1887, is increasing in its membership, and at the present time includes 112 public bodies, municipal, commercial, and legal, besides 43 persons of influence who take an interest in this and other public questions. As will be seen from the appended list of Committee, the members of this Committee are from all parts of Scotland, and are fairly entitled to be regarded as representative of Scottish public opinion on the subject of Private Bill Legislation.

The basis on which this Committee is founded, and the object in view, are expressed in the first two of its original resolutions, viz.:—

“(1) That the present system of Private Bill Legislation, whereby all enquiries into the details of Local Bills are, after the second reading, held before successive Committees of both Houses at Westminster exclusively, is a burden on the time and attention of Parliament, and is also expensive, and in other respects wholly unsatisfactory in its results to the local public interested in local undertakings requiring statutory powers.

“(2) That, having in view the frequent complaints in Scotland of late years against the existing system, the opinion expressed by the Commons' Committee on 10th June 1886, and the subsequent pledges given by Government to deal with

the subject, all which have hitherto produced no result, the time has come to bring the strongest possible pressure of Scottish public opinion to bear in favour of a system of local inquiry and report by a Commission, sitting in Scotland, upon all Scottish Private Bills and Provisional Orders."

An Executive, consisting of twelve gentlemen from different parts of Scotland, was at an early meeting of Committee entrusted with the duty of arranging with the chairman and hon. secretary of the Committee what procedure might be found expedient, in name and on behalf of the Committee as a whole, for attaining the purpose of its association.

After the report obtained from the Joint Select Committee of Lords and Commons last year, in favour of a Commission for the United Kingdom, upon the lines, in substance, of the above quoted resolutions, the Executive deemed it right to press the matter upon the Government and Parliament as one of large importance directly and indirectly to the country, and which ought not to be allowed to fall aside. The increasing demands of proper public business upon the time of Members of Parliament, the difficulty experienced in manning the House of Commons' Committees on Private Bills, and the concurrence in the Joint Select Committee's recommendation generally expressed by public men best qualified to judge, have greatly strengthened this Committee's original position. The interest taken in the matter by the Scottish public has been evinced by the numerous petitions in favour of a system of local inquiry and report by a Scottish Commission which have been presented in the present session of Parliament by public bodies in Scotland, some of them not connected with this Committee.

The Executive have now the pleasure to report that the Government have laid before the House of Commons the Private Bill Procedure (Scotland) Bill, which has been read a first time, and has now been published and circulated in Scotland. It seems to the Executive that this Bill is plainly on the lines of the original resolutions of the Committee. It provides for a local hearing of Scottish Private Bills, and replaces the successive Committees of the two Houses by an itinerant Commission in Scotland, while it leaves Parliament supreme over the reports of this Commission as at present

over the reports of Select Committees,—which are the main things desired by this Committee.

It may be a question whether it would not have been wiser for the Government to have adopted Mr. Craig Sellar's general measure for a Parliamentary Commission, acting in lieu of Select Committees on Private Bills, for all the three kingdoms. But the Executive are quite content that trial of the local inquiry system, which has been the object of this Committee from the first, shall begin with Scotland. They have no doubt that, on a fair trial, its advantages will be seen in the more satisfactory investigation of local measures and in the encouragement of local enterprise. Towards a fair trial, it is absolutely necessary that, warned by the results of a previous incomplete and half-hearted attempt at local inquiries in 1846, both Houses of Parliament shall give to the reports of the new Commission the same respect and authority as are at present given to the reports of their own Committees on Private Bills, and that the new Commission shall be hampered as little as possible by expensive forms and technicalities. The Executive would prefer that power should be taken to the Speakers of both Houses, with concurrence and advice of the Commission, to amend and improve the Standing Orders in many respects, and particularly as to the dates for lodging Bills or Petitions for or against Bills, so that, after provision for due notice, these may not be restricted, as at present, to one period of the year exclusively; that the Commission should have some head or representative in each House of Parliament; and that Bills once referred to the Commission should not fall by the prorogation or dissolution of Parliament, all as provided in Clauses 14, 2, and 10 of Mr. Craig Sellar's Bill. They would further suggest that, while it is perfectly proper to leave to the intended Scottish Commission only Bills relating to Scotland, the power to prevent certain private Bills, described as "of exceptional character or magnitude," from being referred to the Commission is not fair to the Commission, nor expedient in the public interest. Bills which, though presented in the form of Private Bills, are really public in their nature, should be treated as Public Bills; Private Bills which ask for powers never entrusted to private companies or corporations, should be stopped or

corrected in the usual way; but subject to such exceptions, all Private Bills, whatever their character or magnitude, which primarily and directly relate to Scotland alone, and which seek authority for works to be executed in Scotland exclusively, should go before the intended Scottish Commission. As regards the composition of the Commission, the Right Hon. E. Stanhope, M.P., whose scheme was taken by the Joint-Committee, has suggested that the already existing Railway Commission for the three kingdoms, which is believed not to be over-burdened with work, might well undertake the business of hearing Private Bills locally. The constitution of that Commission, or of the Commission in Mr. Craig Sellar's Bill, might with advantage be followed in the present Bill; and there should be clearer power, if necessary, to meet a pressure of business, to set a second body of Commissioners to work. Moreover, it is thought that power should have been taken, whenever a Provisional Order in preparation before a Department is opposed, to refer to the new Commission the trial of the issues raised. The weakness of the Provisional Order system at present lies in the want of any sufficient power of judicial or semi-judicial investigation, which the new Commission could easily supply; and it is not to be forgotten that this Committee has, by its resolutions, always indicated applications for statutory powers in the form of Provisional Orders as worthy of the attention of a Commission, equally with similar applications in the form of Private Bills.

The Executive, however, are to be understood as heartily accepting the Bill as it stands. Amendments such as they have indicated, or others not above mentioned, may be made on the Bill after it passes the second reading; but the Bill, in its general lines and principles, is submitted to the Committee as a distinct success for their views and a compliment to Scotland. It is earnestly hoped that it will become law, and for that end it is suggested to all the members of this Committee that they should do all in their power to secure its being passed. The Committee has not the right to petition Parliament in its associate name; but the public bodies, of which it is mainly composed, will probably consider how, by petition or otherwise, they can best secure, by the passing of this Bill,

the object for which the Committee was constituted.—*Reported and signed at a meeting of the Executive, held to-day, by*

R. VARY CAMPBELL, *Chairman.*



A Jury drinking Intoxicants.—In the Supreme Court of California, 5th March, in the case of the *People v. Lee Chuck*, the appellant, having been convicted of murder in the first degree, and sentenced to death, prosecuted an appeal for the reversal of the sentence. The grounds of appeal were several. One was the misconduct of the jury in drinking intoxicating liquors while deliberating upon their verdict. The Court dealt exhaustively with all the points raised; but in reversing the judgment order, and remanding the cause for a new trial, they proceeded (one, Mr. Justice M'Farland, dissenting) on the ground named. We quote some passages from the judgment of Mr. Justice Works. After dealing with the other grounds on which reversal was sought, his Honour said:—

"The grave charge is that the jury drank intoxicating liquors while they were deliberating upon their verdict. The affidavits show, beyond question, that the case was given to the jury at 3.35 o'clock in the afternoon; that they had failed to agree up to the hour of 6.30, when they were taken, in charge of a deputy-sheriff and bailiff, to a restaurant for dinner; that they were served with a 'French dinner,' and, with other refreshments, partook of a half-dozen quart bottles of claret wine and a half bottle of cognac, the latter being used as flavouring for their coffee; that they were about an hour at the restaurant, when they returned to their room, and within two hours agreed upon the verdict that was returned into Court. There are affidavits showing that, when they returned from their dinner, their conduct and appearance, or that of some of them, were such as to indicate that they had been indulging in intoxicating liquors, and it is alleged that their having done so resulted in their agreeing upon the verdict. The two officers in charge make affidavit that none of the jurors were intoxicated, or gave any evidence of being in that condition. Each of the jurors makes an affidavit in which he admits that they drank wine, and took cognac in their coffee, but he does not know how many bottles. Their

affidavits are, we believe, substantially, if not precisely, alike, and in each it is said: 'And this affiant further avers that upon the said occasion this affiant was not drunk or intoxicated, and that this affiant's intelligence and good judgment were not obscured or affected in any way by intoxicating drinks of any character, and as far as his observation extended, no one of said jury became drunk or intoxicated upon said occasion, and that the intelligence and good judgment of no one of said jury became or was obscured by intoxicating drinks upon said occasion;' and further, 'that he for himself did not find any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned; and this affiant repels and repudiates the truth of any insinuation that he, or, so far as his observation extended, any of the members of the jury, found any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned.' It appears, therefore, that the amount of liquors mentioned was consumed. Whether it was equally divided—one pint of wine to each juror—does not appear. If any juror drank less he has refrained from saying so, perhaps out of delicacy for the feelings of his associates, who would be convicted thereby of having taken more.

"The learned Attorney-General contends that this was not such misconduct as should reverse the case, because the wine was 'California claret,' and the cognac was used as a 'flavouring for coffee.' Whether he intends to insinuate that California claret is too weak to intoxicate, or to claim that to drink wine of our own make should not be treated as misconduct, does not appear; nor does he show that cognac is less effective when adulterated with coffee. The affidavits show that the wine was intoxicating, and the prosecution introduces the affidavit of the proprietor of the restaurant to show its age, quality, and probable effects. He says: 'Said claret wine was a good quality of California Zinfandel wine, of four years of age;' and that he has 'been engaged in the restaurant business for a period of ten years past; that he has had great experience with wines and their effects, and that he scouts as foolish and absurd the idea that twelve full-grown men could be seriously or at all affected by using—

if they did use—six bottles of claret at dinner, with a little cognac in their coffee afterward.’

“It must be conceded that this is some evidence that the whole twelve could not have been seriously or at all affected, and perhaps that none of them were so affected, assuming that the wine and cognac were equally divided. We are thus led to consider at the outset whether this Court should stop to inquire what was the effect of the drinking of these liquors. That the jury drank the liquor is not denied. The sole question raised is, whether the mind of any member of the jury was so affected thereby as to impair his intelligence or judgment, or render him less competent to transact with clearness and impartiality the grave duty resting upon him. It is infinitely more important that the channels of justice be kept pure and untainted than that the verdict against this defendant shall be maintained. The question is not a new one. In some cases it has been held that for a juror to take a drink of liquor during the trial was sufficient ground for granting a new trial. The case before us presents quite a different question. Here the trial had closed. The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society, and to themselves. They had up to the time of partaking of the liquors failed to agree, and soon after agreed upon and returned a verdict that, if sustained, must send the defendant to the gallows.

“It seems to us that if the fact that the jury drank intoxicating liquors, without proof that it affected their minds, or the conclusion reached by them, could be held sufficient to set aside the verdict in any case, no stronger case than the one before us could be presented. We are of the opinion that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict in a capital case, a verdict of conviction should not be allowed to stand. This is our conviction, independent of authority, but the great weight of authority is to the same effect.”

His Honour then examines a mass of decisions bearing on the matter, and adds:—“We have given these authorities our careful attention, and find that while they support the general

rule, that misconduct of the jury should not avoid a verdict unless it appears to have injured the complaining party, in our judgment they do not shake the well-established and salutary rule above laid down, when applied to a capital case, where the misconduct occurred while the jury were actually deliberating upon their verdict."



SIR ADAM GIBB ELLIS, Chief-Justice of Jamaica (advocate 1866), is at present in this country on leave.

Reviews.

The Life of the Law ; or, Universal Principles of Law. By OVERTON HOWARD. J. & W. Randolph & English, Richmond, Va. 1889. (114 pp.)

NOTWITHSTANDING the apology with which the author ends this pamphlet, we cannot help expressing the strongest opinion that he has done himself an injustice by its publication. The style is inaccurate, and shows signs of haste ; the matter is unsystematic, and in many respects juvenile. Throughout the whole work the confusion of laws of nature in the physical sense, with true laws in the jural sense, is most painfully marked. If the phrase in question is ever used in jurisprudence, it should only be with constant reference to a definition ; and as law is now, in the hands of the followers of Sir Henry Maine, rapidly becoming a truly physical science, there is the more reason for confining "the Law of Nature" to the ordinary scientific use.

Mr. Howard seeks to reduce all law to the one (physical ?) law of self-preservation of the individual, and gives a sketch of the development of society through its different stages—of which we may say it is magnificent, but it is not history. Admitting for the moment that the preservation of his own life is the aim of the individual, and that this fact is a law of nature discovered by observation, we must bear in mind that we cannot conceive man as a *mere* individual. Observation shows us that men exist in groups, and that one group seeks to preserve itself against other groups, by the

sacrifice of the individual if necessary. The struggle both between individuals and between groups is one between the two principles of egoism and altruism, and it is absolutely inaccurate to speak of one of these principles as prior to the other. We can as little disassociate the two principles in our conception of man as we can disassociate the centrifugal and the centripetal force in the motions of the planets. And, though for purposes of analysis we may reduce society to individuals, these do not form society any more than ten stones of bones and of muscular and other fibre form a man. Man is born in society, and the law of self-sacrifice is as early and as necessary to our conception of man as the law of self-preservation. As Mr. Herbert Spencer has shown, the begetting and rearing of children involve this sacrifice; and so does the whole life of society, however slight may be the organization.

There is another idea on which our author dwells at great length, and which seems to us utterly erroneous, viz. that as States become more civilised, governments grow weaker (p. 30 *et passim*). But the very opposite appears to us to be the law of progress, and Mr. Howard himself shows this in regard to the criminal law (p. 93). In early times governments might be tyrannical with a few individuals, but means of communication were so slow, and the difficulty of obtaining intelligence was so great, that a central government might be all but powerless in outlying districts. We might illustrate this from the history of the Scottish Highlands down to the beginning of this century. Americans could tell us the same story of the Wild West. To a superficial observer, the power of an autocrat, supported by thousands of armed men, appears to be great; but it is nothing compared with the power of a free government, supported by the united suffrages of a free and intelligent people. If the people are absolutely united in a just cause, the government will be omnipotent.

We have not space to notice the treatment of the laws of procedure. This is also in many respects unsatisfactory. For example, the distinction of Common Law and Chancery is purely accidental, and, as we see in Scotland, is not necessary to the satisfactory administration of justice. Again, perhaps, the most interesting portions of the work, though they occur

somewhat by way of digression, are the attacks on the American corporations, and on the banking system and on protection. These are economical and political, and not legal questions, for the laws as such may be formally perfect, though substantially they may be most inexpedient, if not unjust. These passages lead us to hope that the author in the succeeding work which he appears to contemplate, will open the eyes of his fellow-countrymen to the folly of some of their existing institutions. Nor will the lessons which he seeks to enforce be entirely lost if they are addressed also to the people of this country.

English Decisions.

COMPANY.—*Winding up—Restraining proceedings—Inquiry directed by Board of Trade—Companies Act, 1862, sec. 87—Tramways Act, 1870, secs. 4, 42, 44.*—The official liquidator of a company in liquidation moved for an injunction to restrain the carrying on of certain proceedings before a referee, which had been directed by section 4 of the Tramways Act, 1870. The construction of the tramways had been authorized by a Provisional Order made by the Board of Trade under section 4 of the Act, certain persons being named in the Order as the promoters. After the tramways had been opened, the Board of Trade had (under section 42) directed an inquiry by a referee into the truth of a representation which had been made to them by two local boards, that the said promoters were insolvent, and consequently unable to maintain or work the tramways advantageously to the public. The company had purchased the undertaking from the promoters, but the sale had not received the consent of the Board of Trade as required by section 44. *Held* (by Mr. Justice North), that the inquiry before the referee was not a proceeding against the company, and that the proceedings could not be restrained under section 87.—*Re The Pontypridd and Rhondda Valley Tramways Company*, High Court, Ch. Div., 12 April 1889.

COMPANY.—*Prospectus—Misrepresentation—Capital subscribed—Reparation.*—The prospectus of a company contained a statement that the share capital was £300,000, of which £200,000 had been already subscribed. At the date of the prospectus only £35 had been actually subscribed, but there were two contracts between the company and G. S., under which G. S. had agreed to take £200,000 in fully paid-up shares as the consideration for the sale of a concession, and as part payment for the construction of certain works. *Held*, that the statement in the prospectus was material and was untrue, and that debenture-holders who had taken stock

upon the faith of it were entitled to damages. The action was commenced by fifty-four plaintiffs. At the trial some of them did not appear to prove their case, and as regards them the action was dismissed with costs, no affidavits having been filed as to the reason of their absence. On appeal, evidence was produced that they were ill, and the Court directed that the dismissal of the action as regards these plaintiffs should be without prejudice to their right to bring a fresh one.—*Arnison v. Smith*, Ct. of App., 12 April 1889.

MORTGAGE.—Sale—Error in description—Compensation—Liability between first and second mortgagees.—Certain property which had been mortgaged to the defendants, and subsequently to the plaintiffs as second mortgagees, was put up for sale by the defendants. The particulars prepared by an auctioneer employed by the defendants, contained a statement to the effect that all the roads on the property were constructed in the best possible manner, and were kerbed and sewered, and that the drainage was perfect. This was not the case, and after the sale the defendants were obliged to allow £895 to the purchasers as compensation. This left nothing to the second mortgagees. The amount allowed was held to be a proper allowance. The plaintiffs contended that the defendants were liable to account for the amount. *Held* (by Mr. Justice Kekewich), that the first mortgagees were liable to the second mortgagees. If the error had been merely one of judgment, or in regard to matters not seriously affecting the success of the sale, defendants could not have been made liable. But where a serious blunder is committed, involving a large diminution of the purchase-money, they are answerable, and cannot shield themselves behind their agent.—*Tomlin v. Luce*, High Court, Ch. Div., 13 April 1889.

LIGHT.—Prescription Act—Special purpose—Obstruction—Injunction.—A memorial chapel, which was unconsecrated, and was used for Church of England and Presbyterian services, was lighted by stained-glass windows. The interior was decorated with mosaics. The light from the windows was sufficient to exhibit these mosaics, but they were so adapted to the existing amount of light that a slight diminution of it would spoil the intended effect. The apertures of the windows were ancient lights, and for more than ten years sufficient light had been supplied to illuminate both the windows and the mosaics. The defendants now proposed to erect a large building, which would, in the opinion of the Court, cause obstruction sufficient to restrict the time within which Divine service could be performed within the chapel without artificial light, and also to substantially alter the character of the chapel by spoiling the effect of the mosaics in the day-time. *Held* (by Mr. Justice Kekewich), that the plaintiff was entitled to an injunction on both grounds.—*The Attorney-General v. Queen Anne, etc., Mansions*, High Court of Justice, Ch. Div., 18 April 1889.

DAMAGES.—Tram-car—Defective condition of tramway.—A tram-car belonging to defendants was running on the line of another company over which defendants had running powers, when the car

was thrown off the line, in consequence of the points being defective, and injured plaintiff and his wife (who had subsequently died) as they were crossing the road. In an action by plaintiff to recover damages for the injuries he sustained and for the death of his wife, the jury found that there had been no excessive speed or mismanagement on the part of defendants, but that the accident happened in consequence of the defective condition of the points, of which defect defendants were ignorant. On these findings Mr. Justice Charles gave judgment for plaintiff; and defendants appealed. *Held* (Lord Esher, M. R., and Lords Justices Lindley and Lopes), that the accident happened by the immediate act of defendants, and that they were liable to the plaintiff. It was true that the tramway belonged to another company; but, as between defendants and the public, the defendants were bound to see that the plant and machinery which they used were not defective.—*Sadler v. South Staffordshire Trams Company*, Ct. of App., 2 May 1889.

INTERNATIONAL LAW.—*Contract of affreightment—Law of flag or "lex loci contractus."*—A claim was made in the winding-up of an English company by Monroe, a domiciled citizen of the United States, for damages for the loss of certain cattle shipped by him at Boston for carriage to Liverpool, in a ship belonging to the company. In the contract of affreightment there was a clause exempting the shipowners from liability for loss or damage arising from the negligence of the master or crew, and bills of lading were given containing a similar stipulation. The ship having stranded on the Welsh coast, admittedly owing to negligence on the part of master and crew, Monroe claimed damages. This, the liquidator, relying on the said stipulation, resisted. Monroe contended that the stipulation was void, such a proviso being unreasonable and contrary to public policy both by the law of Massachusetts and by the Federal law. Such a stipulation, however, is valid by the law of England. *Held* (the Lord Chancellor and Lords Justices Cotton and Lindley, affirming Mr. Justice Chitty), that the contract was governed by the law of the flag; and also that, the contract being one which could be enforced in England, but not in America, the intention was that it should be governed by English law.—*Re Missouri Steamship Co. Limited*, Ct. of App., 2 May 1889.

PUBLIC HEALTH ACT, 1875.—*Penalty—Member of Board interested in contracts.*—The defendant, a joiner, was elected a member of the Elland Local Board in 1885. In 1886 two contracts were entered into by the Board with two persons for the supply of a warming apparatus and a water tank. Joiner work was necessary in connection with the work, and in each case the contractor employed the defendant's workmen to do it, and paid the defendant therefor. In an action brought under section 70 of schedule 2 of the Public Health Act, 1875, to recover a penalty of £50 from defendant, Mr. Justice A. L. Smith found that defendant had in

fact not been in any way concerned in the contracts, but he considered himself bound by the judgment of Mr. Justice Field in the case of *Tompkins v. Joliffe* (51 J. P., 16th April 1887), and therefore he gave judgment in favour of the plaintiff, with costs. On appeal, *Held* (Lord Esher, M. R., and Lords Justices Lindley and Lopes), that defendant, employed to do part of work which another had contracted to do, was concerned in the contract; and appeal dismissed.—*Milton v. Wilson*, Ct. of App., 2 May 1889.

SALE.—*Vendor and purchaser—Conditions of sale—Right to rescind.*—In a contract of sale there was a condition that in case the purchaser should, within a specified number of days after delivery of the abstract of title, make any objection to or requisition on the title which the vendors should be unable or unwilling to remove or comply with, the vendors should be at liberty at any time thereafter, notwithstanding any attempt to remove or comply with such objection or requisition, by notice in writing, to annul the contract, and to return to the purchaser his deposit money, without interest, costs, or compensation. After the abstract of title had been delivered to him, the purchaser sent in a number of requisitions; to which the vendors replied by a notice rescinding the contract, on the ground that they were unwilling to comply with the requisitions, and they sent a cheque for the deposit. The purchaser returned the notice and the cheque, requesting a reply to the requisitions. The vendors stated they desired to avoid delay and expense, and as they were unable to comply with some of the requisitions, they had passed a resolution annulling the contract. Thereupon the purchaser took out a summons for a declaration that the contract was still subsisting, contending that, even if the vendors were not bound to give reasons when giving the notice of rescission, reasonable ground must exist; and, when 'challenged, they were bound to show that they were not acting out of caprice. *Held* (by Mr. Justice Chitty), that the power of rescission had been well exercised, and the contract annulled by the notice given; and the summons was dismissed with costs.—*Re The 163rd Starr-Bowkett Building Society's Contract*, High Court, Ch. Div., 2 May 1889.

LEGACY.—*Executor—Assent to legacy.*—A testator bequeathed a leasehold house to his niece, subject to the payment of the rent thereof to his wife for her life, and the payment of two legacies of £100 and £25 respectively out of the rent. After the death of the widow, the executor paid part of the rent of the house to the niece, she undertaking to pay the two legacies, and subsequently at her request he applied the remainder of the rent to paying the smaller legacy. In an action brought against the executor by one of the residuary legatees, an account had been directed of the personal estate of the testator not specifically bequeathed. The niece took out the present summons to have it declared that she was entitled to the house free from liability for the costs incurred by the executor, on the ground that he had assented to the bequest

to her. *Held* (by Mr. Justice North), that the executor was not to be taken as having assented to the bequest.—*Re Charik, Abrahams v. Charig*, High Court, Ch. Div., 2 May 1889.

TRUST MONEY.—*Appropriation of payments—Garnishee order.*—The defendant, a stockbroker, kept a bank account, into which he paid only clients' moneys, and upon which he drew solely for the purpose of making payments to or on behalf of clients. On 5th November the balance standing to the credit of the account was £301, 0s. 3d., and on that day the plaintiff, who was a judgment creditor of the defendant for £650, obtained a garnishee order nisi, attaching the balance standing to the credit of the defendant's banking account to answer the debt. On the 13th November the defendant gave notice of motion to discharge the garnishee order, and made affidavit stating that the sum attached was made up of four sums belonging to four clients. *Held* (by the Lord Chancellor and Lords Justices Cotton and Fry, and reversing Mr. Justice North in part), that a judgment creditor could obtain a garnishee order only against money which the debtor was entitled to dispose of for his own purposes; the money in this case was not the debtor's own, and the garnishee order could not therefore be sustained. The whole fund was trust money, and there was no competition as between the *cestuis que trustent* themselves.—*Hancock v. Smith*, Ct. of App., 3 May 1889.

WILL.—*Construction—Widow—Next-of-kin in blood.*—In a post-nuptial settlement the ultimate trust declared was "for the next-of-kin in blood of 'the settlor' according to the statutes for the distribution of intestate's effects, and in the manner in which the same would be distributable if he had died possessed thereof intestate." The widow claimed to share on the ground that the words which followed the phrase "next-of-kin in blood" enlarged the first words to let her in as one of the next-of-kin. *Held* (by Mr. Justice North), that the additional words did not enlarge the meaning of the words "next-of-kin in blood" so as to let in a person who was not one of the next-of-kin in blood.—*Re Fitzgerald*, High Court, Ch. Div., 4 May 1889.

COMPANY.—*Syndicate—Interest in new company—Notice—Companies Act, 1862, sec. 23.*—Plaintiff claimed an allotment of shares in the N. company, and that he was entitled to a lien on certain property of the company. In 1883 another company with the same name was incorporated. This company purchased gold mines from a syndicate, the consideration being fully paid-up shares in the company. The plaintiff (along with others) ultimately became entitled to the interest of one M., who was at one time a member of the syndicate. The shares had never been allotted to the said M. The old N. company was wound up voluntarily in 1885, its assets being sold to the new N. company (the defendants), formed for the purpose of buying and working the mines. Each member of the old company was, by terms of sale, entitled to require an allotment to himself of as many shares of the new company as he

had held in the old. This, however, was subject to the immediate payment of 2s. per share, and a future payment of 1s. per share. The 2s. was never paid on the shares claimed by the plaintiff and others claiming under M. In 1886 the new company was wound up voluntarily. The mines were sold to the V. company partly for cash and partly for fully paid-up shares,—these shares being subsequently at a premium. In an action brought to have it decided whether the plaintiff and others claiming under M. were entitled to participate in the consideration given by the V. company, *Held* (by Lord Esher, M. R., and Lords Justices Cotton and Fry, reversing Mr. Justice Kekewich), that plaintiff was prevented from obtaining specific performance through his lying by during the time when he might have been subject to liability as a shareholder. —*Zuccani v. Nacupai Gold Mining Co.*, Ct. of App., 8 May 1889.

ASSESSMENT.—*Poor rate—House in small tenements—Rateable value.*—The owner of a small house let by the week to artisans, landlord paying all outgoings, appealed against his assessment to the poor rate, claiming that in arriving at the gross estimated rental, deductions ought to be made in respect of losses by reason of the house frequently remaining unlet, and by reason of tenants not being able to pay rent, and also for the necessary costs of collecting the rents. The Divisional Court held (22 Q. B. D. 211) that the gross estimated rental must be fixed by ascertaining the rent at which the house might reasonably be expected to let to a tenant from year to year, free from the various tenants' payments specified in 6 and 7 Will. IV. c. 96, sec. 1, and not by assuming a tenant who would sub-let the house to weekly tenants; and that, therefore, the deductions claimed ought not to be made. On appeal, *Held* (by Lord Chief-Justice and Lords Justices Lindley and Lopes), that the test was not what the landlord received, but what the tenant might reasonably be expected to be willing to give; such a tenant was to be a tenant from year to year; and, therefore, the losses arising from weekly tenants, and the costs of collecting their rents, would not affect such a tenant; and that such was the gross rental on which the assessment must be made. Appeal dismissed.—*Smith v. Overseers of Birmingham*, Ct. of App., 9 May 1889.

COMPANY.—*Voluntary winding-up—Sale of assets to new company—Compromise—Validity—Sanction by Court—Companies Act, 1862, sec. 161—Joint-Stock Companies Arrangement Act, 1870, sec. 2.*—Section 2 of the Joint-Stock Companies Arrangement Act, 1870, provides that, "where any compromise or arrangement shall be proposed between a company which is in the course of being wound up, either voluntarily or under supervision, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, on the application of the creditors or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned; and if a majority in number and representing three-fourths in value of such creditors or class of

creditors, either in person or by proxy, at such meeting shall agree to any such arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the company." A company in voluntary liquidation made, under section 161 of the Companies Act, 1862, a sale of the assets to a new company. There was also an arrangement (approved by the statutory majority of three-fourths of the debenture-holders, and sanctioned by the Court) providing for the issue of shares in the new company to the shareholders of the old company in exchange for their old shares, and the cancellation of the debentures of the old company and the issue in lieu thereof of debentures of the new company to the debenture-holders. In an action brought by the executors of a deceased shareholder to have the arrangement set aside as invalid, on the grounds that a reasonable time had not been fixed within which application for shares must be made, and that shares unapplied for were to be at the disposal of the new and not of the old company,—*Held* (by Lord Esher, M. R., and Lords Justices Cotton and Fry, affirming Mr. Justice Kekewich), that the arrangement, having been confirmed by order of the Court, was binding on all the shareholders. — *Nicholl v. The Eberhardt Co.*, Ct. of App., 11 May 1889.

MORTGAGE.—*Redemption*—*Notice to mortgagee*—*Interest in place of notice to pay off*.—In an action for the redemption of a mortgage, the question arose whether the mortgagee had an absolute right to six months' notice to pay him off, or whether he could be compelled to accept six months' interest in lieu of such notice, it being admitted that *in practice* it had always been considered that he could only claim notice or interest. *Held* (Lord Esher, M. R., and Lords Justices Cotton and Fry), that the practice was a proper one, and that the mortgagee could claim only either the notice or the interest. — *Johnson v. Evans*, Ct. of App., 13 May 1889.

RESTRICTIVE COVENANT.—Defendant, a fancy draper and hosier, was the lessee of a shop under a restrictive covenant against carrying on the "business of ladies' underclothing (except vests and stockings), juvenile outfitting (except vests and stockings), or sale of baby linen, being the business carried on at the adjoining shop" of the plaintiff. He sold four articles of underclothing, which came under the description of "ladies' outfitting," and plaintiff brought this action to have him restrained from carrying on such sales. Defendant maintained that the articles in question were sold also by hosiers. *Held* (by Mr. Justice Kekewich), that as the sale of the articles in question was an essential part of the business of ladies' outfitting, although they were also sold by hosiers, the defendant must be restrained. — *Stuart v. Diplock Brothers*, High Court, Ch. Div., 13 May 1889.

COUNTY COUNCIL.—*Election petition*—*Practice*—*Appeal*.—In an appeal by Lady Sandhurst from a decision of a Divisional Court, that

she was ineligible for the London County Council, a preliminary objection was taken that the Court had no jurisdiction to hear the appeal, since by section 93, sub-section 7, of the Municipal Corporations Act, 1882, it was provided that the decision of the High Court should be final. The question was directed to be argued before the full Court of Appeal. *Held* (by Lord Chief-Justice, Lord Esher, M. R., and Lords Justices Cotton, Lindley, Fry, and Lopes), that the Court had jurisdiction. The effect of section 242 was to incorporate the Judicature Act, and therefore, notwithstanding section 93, to give a right of appeal by leave to the Court of Appeal.—*Beresford-Hope v. Lady Sandhurst*, Ct. of App., 15 May 1889.

Sheriff Court Reports.

SHERIFF COURT OF FORFARSHIRE AT DUNDEE.

Sheriff-Substitute J. CAMPBELL SMITH.

HANTON *v.* TAYLOR AND SPENCE.

Poor Law—Circumstances in which a constructive residence held to be established.—The circumstances of the case fully appear from the interlocutor and note, which are as follows:—

“*Dundee*, 23rd April 1889.—The Sheriff-Substitute having considered the proof led, productions, and whole process, Finds that the pauper whose aliment is in question is the son of the late Robert Malcolm, miller and quarryman, who died at Carnoustie on 27th March 1888; and that, being imbecile from birth, he has been incapable of acquiring a settlement for himself: Finds that the burden of supporting him falls upon the parish of his father's settlement, which is either the parish of his birth, being Monifieth, or of his continuous residence, being Carmyllie: Finds it proved that from Martinmas 1878 to November 1886, Robert Malcolm, the said father, had his house in the parish of Carmyllie, and was possessed of a settlement therein at his death: Therefore repels the defences for the inspector of poor for the said parish of Carmyllie, and decerns against him as representing the parochial board of said parish of Carmyllie in terms of the prayer of the petition: Assoiliizes the other defender, the inspector of poor for the parish of Monifieth: Finds the said defender, the inspector of poor for the parish of Carmyllie, liable in the expenses of process to the pursuer, and the defender the inspector of poor for the parish of Monifieth; Allows accounts of these to be given in, and remits the same, when lodged, to the Auditor of Court, to tax on Scale II., and report; and decerns.

J. C. SMITH.

“*Note.*—It has been settled, as conclusively as judicial decision can settle anything, that the ‘residence’ contemplated by the 76th section of the Poor Law Act may be constructive residence—that is, residence determined by an idea or set of ideas irrespective of

the bodily shiftings from place to place of the head of the family. (*Beattie v. Stark*, 6 R. 956 ; *Deas v. Nixson*, 11 R. 945, and authorities there cited.)

"The question here is whether the facts are such as to satisfy the idea of a continuous constructive residence. The real pauper is an idiot who has never been capable of acquiring a settlement, and whose settlement, according to the admitted law, must be either in the parish of his father's birth, which is Monifieth, or of his father's alleged residence, which is, or was, Carmyllie. Continuous residence in fact in Carmyllie, on the part of the father, is not alleged. In point of fact he led a nomadic sort of life, generally working as a quarryman in the summer, when the weather was good and wages were higher, and as a miller in winter, preferring in the cold stormy season the shelter of the mill and the lighter labour, although his rate of pay was less as a miller than as a quarryman. The time which embraces the facts relevant to the present inquiry extends from Martinmas 1878, when the said father, Robert Malcolm, became tenant of Milton of Conon, in Carmyllie parish, to November 1886, when, after six months' working in Carmyllie quarries, he went to a mill in the parish of Kirriemuir, and left Carmyllie for the last time. Every winter between these dates, except the first two winters, were spent working in mills outwith Carmyllie parish, and every summer succeeding the winters spent in outside mills was spent in Carmyllie parish, either at work in the quarries there or in idleness, because of illness or want of work. For example, during the winter 1880-81, he was at the mill of Arbirlot from 29th November 1880 to March 1881, when he left. For a month or two, according to the evidence of his daughter Jessie, he did not work any, then he was at the quarries of Carmyllie till after harvest, and the next winter he was at Craigmills, in the parish of Strathmartine, near Dundee. The details as to the migrations, which I have tried to describe generally, may be ascertained in so far as ascertainable from the evidence of this daughter, and from the documents in process. Nothing, as it seems to me, turns upon details, except it may be in regard to his tenancy, or alleged tenancy, of the mill of Craichie from March or April or Whitsunday 1883 to February 1884. What took place then was, it is argued on behalf of Carmyllie, sufficient to sever his residential connection with that parish, both in idea and in fact. Both actually and constructively until Martinmas 1883, his five years of residence could not in any view of it be completed, and the argument for Carmyllie is, that the five years were never completed, because when he went to Craichie he went there to establish the business of miller, and thus abandoned Carmyllie both in intention and in fact. This is the strong point in the case of Carmyllie, and if it fail, I do not think there is any other upon which Carmyllie can be entitled to succeed.

"To get at the heart of the real matter in dispute, it is necessary to put the question formulated by more than one judicial master of precision in expression. What was this man's home? and to

bring that question into clear relief by the negative alternative, Had he no home at all? I do not think our law anywhere, and certainly never in the poor law, contemplates the idea that any man can be without a home. The home may be difficult to find, but it is always presumed to exist. The poor law certainly contemplates one home, and it rejects the idea of more than one, and most of the difficult questions in regard to residential settlement resolve into a competition in renunciation between two or more homes, because the pauper's estate is a sort of negative quantity.

"The present case resolves into a balancing of evidence, and of legal presumptions as between two homes, one of which I may describe, for brevity's sake, as the home of his occupation, and the other with equal terseness and roughness, as the home of his affections, assuming, of course, that the old man had not become an entire stranger to human affection; and, further, holding it to be proved beyond doubt that he did have a strong fatherly fondness for his idiot boy—a fondness not to be accounted for by self-interest or cold reason, but nevertheless the ruling instinct or passion of the father's latter years.

"There can be no doubt that, during the first fifteen months that Robert Malcolm lived in Carmyllie parish at Milton of Conon, his house was there, and all but indisputably also up to Martinmas 1880. But when there, in or about the beginning of 1880 he granted a trust-deed in favour of his creditors, his daughter Jessie, who was his housekeeper, bought the furniture of the house from the trustee, and the trustee advised her that, in order to keep the furniture safe, the house in which she was to keep it must be taken in her own name. Thereafter the house was chiefly in Jessie's name. She says that when the receipts for rent were in her father's name, it was by mistake. But he always appears to have acted and been received in the house as if it had been his own. He lived in it when he was working in the quarries in the parish of Carmyllie summer after summer, and he also lived in it when he was not working, getting his food off the common table. He paid neither board nor lodgings. He gave all his wages to Jessie, except a little which he retained for tobacco and pocket money, and out of his earnings this family of three, which included the imbecile boy, was supported. When he was absent in the winter time, employed at mills, he returned as often as he could to his daughter's house, and spent his Sundays there, going to the Free Church in his best or only black suit, which he never withdrew from the parish of Carmyllie. The daughter washed his working clothes for him as he required them. She acted, in short, as his housekeeper, just as her mother or stepmother would have done, had not both happened to die. The death of a wife may deprive a man of a home, but I don't think it does so by necessity of law. I do not think it ever occurred to this old man that either his second widowhood or his trust-deed had stripped him of a home. Neither did this occur to his family. A sister, one of the second family, also a brother, was married out of this house after it in name became the

daughter's. The idiot boy, dear to the father's heart, always lived there; and when the father's last illness had hung a week about him, he rose from his sick-bed among strangers, and travelled fully twenty miles to reach this daughter's house to be nursed there, and to die. If this daughter's house cannot fill up the measure of the legal idea of a home, I think the bothy of the mill of Craichie is still less fit to do it. That the old man went there in the spring of 1883 is certain, whether at Whitsunday or six weeks before it is not so clear. That he took the mill for a year, and that he stayed eight or nine months, is proved only by one witness. I assume it to be true, also, that he tried to carry on business there, and, on the other hand, that it is not less true that, though there during the week, he spent all his Sundays in Carmyllie at his daughter's. But if this frail old man, after he had been stripped of everything by his creditors except his clothes, hoped at his time of life to establish a new business for himself at Craichie, I can hardly resist the conclusion that his mind was as frail as his body. Delusive hopes must have led him to talk vaguely, as if he expected his daughter to go there to keep his house. This important fact, however, is that she never went, and that what was virtually this old man's family, and all that had to suffice him for *lares et penates*, never were transferred. Certain articles, no doubt, were transferred from the daughter's house. The farmer of Craichie says only "a chair and a table," not so much as a bed, and the chair and table were left behind him when he left in February, probably in deference to the law of hypothec, or perhaps because they were not worth carrying away. The daughter aids to the farmer's inventory a second chair, a bed, and some dishes. There were, it seems, three rooms in this miller's house or bothy. Whether it be called a house or a bothy, it does not seem to me to have been furnished according to any ordinary Scottish ideal of a house, and I, for my part, feel utterly unable to believe that this old man could ever have felt at home there until in that house a shelter was found for his helpless boy. Therefore my opinion is against the contention of the parish of Carmyllie. (*Cruickshank v. Greig*; 4 R. 267, and *Watson v. Macdonald*, 6 R. 202.) J. C. S."

For inspector of Barry—Mr. William Cæsar, solicitor, Dundee.
For inspector of Monifieth—Mr. Robert Smith, solicitor, Dundee.
For inspector of Carmyllie—Mr. George Watt, solicitor, Dundee.

The inspector of Carmyllie has appealed the above interlocutor to the First Division of the Court of Session.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

Codification of the Law of Sale.—Lord Herschel has introduced into Parliament a measure for the codification of the English law of sale. The Bill is prefaced by a memorandum, pointing out that “it endeavours to reproduce as exactly as possible the statutory and common law rules relating to the sale of goods;” but that “no attempt is made to reproduce the effect of cases which, though arising out of sales, merely illustrate principles common to the whole law of simple contracts.” It is added, that “the Bills of Exchange Act has worked smoothly, and has already been adopted by two of the Australian colonies.” This latter Act, it will be remembered, applies to Scotland. The Bill introduced by Lord Herschel does not apply to this kingdom; but a Committee of the Faculty of Advocates, which was appointed to consider it, think that it would be a great advantage if the law of sale in the two kingdoms were assimilated; and accordingly they have undertaken to adapt Lord Herschel’s measure to the law of Scotland, with the view of leaving it to Parliament, with the two measures before them,—Lord Herschel’s embodying the law of England, and the one prepared by the Faculty Committee adapted to the law of Scotland,—to select the provisions which best commend themselves to it as suitable to be made the law of the United Kingdom.

Destruction of Codicil—Intention.—The case of *Thornton*, decided by Mr. Justice Butt upon June 4, raises an interesting point in reference to the destruction of a testamentary writing. An old lady executed a codicil to her settlement, but in filling in the date she made a clerical error. Under the impression that this error was fatal, she directed her two grand-nieces to tear up the codicil; and accordingly it was torn into four pieces. On the same day the old lady sent the torn pieces to her solicitor, with a direction to re-engross the deed. This was done, and the deed was returned for signature; but the old lady was unable through illness to subscribe it, and she died shortly afterwards. In these circumstances, Mr. Justice Butt held that the codicil was not destroyed *animo revocandi*, and accordingly he admitted it to probate. This decision is certainly not in accordance with the law of Scotland. The codicil was certainly destroyed with the intention that it should not be used as a testamentary deed. Had the testatrix, instead of tearing it up, put it in the fire, and written her lawyer to re-engross it from the draft, the *animus* of the burning would have been exactly the same as was her *animus* in directing it to be torn up. We have little doubt that Mr. Justice Butt's decision did substantial justice, and would have been highly approved of by the old lady herself; and one is painfully conscious that the strictness of our own law sometimes operates to defeat the real intention of the deceased. But, on the other hand, there is much to be said for the view that strictness operates beneficially on the whole, by encouraging carefulness and prevision in testamentary matters, and diminishing the chances of fraud. If strictness, too, be departed from, it is difficult to know where to stop. If a destroyed writing is to be admitted, why not a writing unsubscribed? and if an unsubscribed writing, why not instructions to prepare a settlement?

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Striking off Solicitors.—Sect. 32 of the Act 6 and 7 Vict. c. 73, provides that any solicitor allowing an unqualified person to use his name "shall, and may, be struck off the roll, and for ever after disabled from practising." A solicitor who had been struck off two years ago applied for readmission.

The Court (Field and Cave, J. J.) held that they had no power to readmit. It was clear that the statute gave the Court no power of suspension. Where the Court has a power to suspend, it is impliedly open to it, even although it has struck off, after a period to reconsider its decision, and to readmit the offender as though the original sentence had been one of suspension merely. All the reported cases of readmission are of this kind. It was argued that the words "shall and may" gave a discretion to the Court, but the answer was, that this was a discretion either to strike off or not to strike off. It was pointed out, that in the case of *Grayston* (85 L. T. 264) the Lord Chief-Justice and Mr. Justice Denman passed sentence of two years' suspension for the offence in question, but the Court thought this must have been done *per incuriam*. Thieves and swindlers may be readmitted, but to the solicitor who lends his name to another, the law has left no place for repentance. With much deference, we think this decision all wrong. To say that a man is "for ever after disabled from practising," is just a statement of the effect of his being struck off the roll, and has no bearing upon the question of a power to repon. A student who is expelled from a university is "for ever after disqualified" from studying there, but that does not bar the university authorities from subsequently pardoning him. A minister of the Church of Scotland who is deposed, is "for ever after disqualified" from holding a benefice or administering ordinances in the Church, but the General Assembly, after a season of repentance and grace, may repon and restore him.



Maritime Lien.—By their decision in the case of *The Sara* (87 L. T. 92), the House of Lords has exploded another generally accepted doctrine of maritime law. If there was one rule which more than another maritime lawyers regarded as settled, it was that a master has a maritime lien on his ship for disbursements in respect of necessaries for the ship. It was so held by Dr. Lushington in *The Mary Ann* (13 L. T. Rep. N. S. 384; L. Rep. 1 Ad. & Ec. 8), and the rule has never been doubted in practice for many years. The decision of Dr. Lushington was based upon the statutory right *in rem*

held by the master. But a statutory right *in rem* does not of itself create a maritime lien, and the House of Lords have held that in the case of a master's disbursements it has no such effect. No doubt it is highly inconvenient to disturb a fixed course of practice, but the House of Lords pointed out that where the practice is based upon an erroneous construction of an Act of Parliament, there is no principle preventing them from setting the matter right. There is this to be said for their decision, at all events, that occult claims of this kind are generally undesirable, and frequently entail great hardship upon *bona fide* purchasers and mortgagees.



Lavatory Law.—Where a solicitor or merchant provides a lavatory for his clerks, and through one of the clerks carelessly forgetting to turn off the tap after washing his hands, the descending flood desolates the premises beneath, the employer is liable in damages (*Stevens v. Woodward*, 6 Q. B. Div. 318). But where the employer, whilst providing himself with a hand-basin, selfishly denies this luxury to the clerks, and even sternly forbids them to make use of his one, the employer is not liable in damages, although the clerk, having used the basin in disobedience to his orders, and forgotten to turn off the tap, devastates with devouring torrents the premises below (*Ruddemann v. Smith*, 50 L. J. Q. B. Div. 231). The employer is liable for his clerk's carelessness only when to that carelessness there is not superadded the sin of preferring cleanliness to obedience.



Citation of the Co-respondent.—By the English Divorce Act of 1858 it is provided (sect. 28), that upon a husband's petition "the petitioner shall make the alleged adulterer a co-respondent, unless, upon special grounds, to be allowed by the Court, he shall be excused from so doing." In the case of *Gill v. Gill*, before Mr. Justice Butt the other day, the respondent had made a confession of having committed adultery whilst living apart from her husband, and had given birth to a child of which she said a certain man, not her husband, was the father. The husband raised an action of divorce, alleging adultery

against his wife with the man she had named. On investigation, the husband was unable to find any corroboration of his wife's story which would be evidence against the co-respondent. In these circumstances he applied for leave to dispense with the citation of the alleged adulterer as co-respondent in the case. The special grounds put forward in support of the application were, that it would be a hardship to compel the petitioner to cite as a co-respondent a man against whom he was unable to obtain any legal evidence, and who would in these circumstances, when the case came on for hearing, be entitled to be dismissed from the suit, and to have his costs paid by the petitioner. On the question coming before him, Mr. Justice Butt inquired whether there were any authority upon the point, and he was referred to a case of *Jinkings* (L. R., 1 P. and D. 330). After referring to this case, his Lordship granted the motion. Apparently the learned judge entirely overlooked his own decision in the case of *Payne* (60 L. T. Rep. N. S. 238), which was exactly on all fours with the case of *Gill* now before him, and in which he decided, that as the respondent had named a certain man as the father of her illegitimate child, he must be cited as a co-respondent in the suit. No such difficulty could arise in Scotland, where it is optional to make the co-defender a party to the suit. The Scottish practice might conceivably occasion hardship, by debarring an alleged adulterer from an opportunity of defending his reputation; but we do not recollect of such a cause of complaint having emerged. Since the foregoing was written, we have observed the case of *Wheeler v. Wheeler*, decided by Mr. Justice Butt upon 19th June. In this case it was held that an alleged adulterer might intervene and defend himself against the charge, although upon special grounds he had not been made a party to the action. So far as we recollect, this point has not occurred in Scotland, but there seems no reason why, under such circumstances, the alleged paramour should not be allowed to sist himself as a party to the action.

* * *

The County Council and the Control of the Police.—By section 11 of the Local Government (Scotland) Bill, there are transferred to and vested in the new County Council, *inter*

alia, "the whole powers and duties of the Commissioners of Supply, save as hereinafter mentioned;" and one of the exceptions referred to is that of the administration of the police. As is well known, a Standing Joint Committee for the county (consisting of members of the new Council, not exceeding seven, and of the Commissioners of Supply, not exceeding seven, with the Sheriff or one of his Substitutes as an *ex officio* member and chairman) is created by section 18 of the Bill, for certain purposes. This Joint Committee is to come in the place of the Police Committee established under the Police Act of 1857, and "shall have all the powers and be subjected to all the provisions of that Act." (Section 18 (5).) In certain speeches made in the House of Commons during the debate on the second reading of the Bill, this provision was referred to in a way which seems to point to a misapprehension of the powers and duties of these existing Police Committees. The speakers proceeded on the ground that the Commissioners have, at present, the "control" of the constabulary—that is, the power of giving orders to the police. This is an error. The Police Committee have no such power. It is not the Commissioners who are charged with the duty of maintaining order within the county. The Sheriff, and to some extent the Justices, have this duty. It is they, consequently, who have authority over the constabulary. The Commissioners and their Committee merely provide the necessary instrument for these authorities.

* * *

Bell and Book.—The (so-called) musical bells on St. Giles Cathedral in Edinburgh are at present causing a great deal of annoyance and acute pain to the practitioners at the Parliament House. They are certainly not "sweet bells;" and are, moreover, "jangled, out of tune, and harsh." The other day a perfectly loyal subject of Her Majesty had his hat rudely knocked off in the vicinity of the noise, and on mildly inquiring what might be the reason of such treatment, was asked, "Don't you hear 'God Save the Queen,' sir?" The man was a stranger to these parts, and, being musical, he of course failed to recognise the "tune" then being hammered upon the bells as "God Save the Queen," or anything else he had

previously heard. At this season of the year, when the heat makes the sweetest irritable, and when in the interests of ventilation windows must be kept open, this wild, mad twanging is a serious distraction. The law of Scotland will suffer as a consequence; pleading, both written and oral, must degenerate under the influence. "Whatever," says a standard author, "renders life uncomfortable to the public generally or to the neighbourhood, . . . is a nuisance." If the wild havoc of the St. Giles bells does not come well within that description, definition is a delusion. Are practising lawyers, like certain practising doctors, capable of prescribing for patients only and not for themselves?



Separation a mensa et toro.—We have pointed out above how the Court of Queen's Bench have held that the door of mercy is for ever closed against a solicitor who is struck off the rolls for allowing another to practise in his name. In the case of *Strain v. Strain*, 21st June 1889, Lord M'Laren was obliged reluctantly to come to the conclusion that, so far as the Court is concerned, the same fate attaches to the spouse whose consort obtains a judicial separation. It is true the injured party can at any time forgive the other and resume cohabitation, but if that party is obdurate, the Court can give no relief, no matter how sincere the evidences of repentance on the part of the offender may be. In this case the wife obtained separation and aliment at the rate of £52 a year, owing to certain acts of cruelty on the part of her husband. After four years the husband comes forward and represents that he cherishes a sincere attachment to his wife, that he profoundly regrets his previous misconduct, and promises complete devotion if his wife will resume cohabitation with him; he represents, further, that he believes that she is only restrained from doing this through the influence of her relatives. In these circumstances, Lord M'Laren held that he had no power to abrogate or suspend the decree of separation and aliment, which by the law and practice of the country is final, so long as the injured spouse insists in it. The case may be one of hardship, but, on the other hand, much of the value of judicial separation would be taken away.

if it were in the power of the wrongdoer periodically to reopen the matter. The difficulty might be got over by the introduction of a distinction in the treatment of aggravated cases and less serious ones, and the use of *interim orders* in the latter class of cases.



Captain Woodward's Contempt.—Captain Woodward, of the flagship *Duke of Wellington*, has been fined £50 by the Court of Queen's Bench for contempt of Court. The story of the proceedings is involved and complicated, but it appears that the gravamen of the charge for which Captain Woodward has been punished consists—(1) in his having, in obedience to his superior officer, sent a man back to his regiment under escort after he had learned by telegram that a writ of *habeas corpus* had been issued against himself to bring the man up, and (2) in having eventually, on receipt of the writ, sent the man up in custody, without any return upon the writ showing why the man had been detained. It was pleaded on behalf of the Captain, that he had not intended any contempt of Court, and had acted under ignorance in the matter. The Court accepted this excuse, in so far as they stated that if they had thought the offence had been committed wilfully they would have passed sentence of imprisonment. The result arrived at does not commend itself as satisfactory. If the Captain intended no disrespect to the Court, the worst he was guilty of was stupid bungling; and bungling, however inexcusable, does not constitute contempt of Court. In regard to no offence more than contempt of Court, is the question one of *animus*. The observations of the judges in the case make clear a point which is not generally understood, viz. that where a person is improperly in custody, and his custodian receives a writ of *habeas corpus*, the duty of the custodian, if satisfied that the detention is illegal, is not to bring the man up into Court and to explain why he has detained him, but to let the man go, and make a return on the writ showing why he had been detained.



Actions of Damages for Personal Injuries.—An idea seems to have taken strong possession of the minds of the working

classes, and it has certainly received no small encouragement from juries, that a working man is entitled to damages against his master whenever he meets with injury in the prosecution of his work. There may be much to be said in favour of compulsory insurance against accident or death, to which employers should be obliged to contribute. But no such system exists, and the only ground upon which an employer can be made liable is, that he, or those for whom he is responsible, have been personally at fault. Recent cases before the Courts, both of England and of Scotland, suggest that there is a popular conviction that the mere occurrence of accident raises an overwhelming presumption of fault, and that the condescendence upon any particular act of *culpa* is little more than a matter of form. In the case of *Ramsay v. Robin* (26 S. L. R. 539), the Court were called upon to set aside a verdict for £100 in favour of a man who had sustained injuries through a beer barrel slipping whilst he and his companions were storing it in the cellar of a customer. The only fault that could be suggested was, that the master ought to have had a block and tackle fitted up in all his customers' cellars, a contention which proved preposterous enough to carry the jury with it. The idea that the injured are entitled to damages from some one is not limited to cases of master and servant, as was evidenced in the case of *Duff v. The National Telephone Co. Limited* (26 S. L. R. 512), where damages were sought for the death of a child who was killed by his companions crushing him under a wheelbarrow. Here the owner of the wheelbarrow was the defender, and the ground of action was that a wheelbarrow was a dangerous instrument to leave out in a place open of access to children. The Court had no hesitation in throwing out the action as irrelevant. We expect next to have an action of damages by the boy who gets his leg broken bird-nesting, against the owners of the trees, for leaving such dangerous vegetables at large in a public place.



Parnell v. the "Times."—The Queen's Bench Divisional Court (Denman and Charles, J. J.) have confirmed the decision

of Mr. Justice Stephen postponing the trial of this cause until November next. It was urged on behalf of the *Times*, that the trial should be postponed until the inquiry of the Commission is concluded, on the ground that the report of the Commission may influence the verdict. The Court regarded this as an illegitimate consideration, but they granted the crave of the *Times* to have the trial postponed, on the ground that in any case the trial could not come on until Michaelmas term, and that meanwhile the hands of the solicitors of the *Times* are quite full with the Commission inquiry. Moreover, as the *Times* had not pleaded justification, the plaintiff was not left labouring under any imputation owing to the postponement of the trial. The *Times*, it appears, has paid forty shillings into Court. It has been suggested that this implies a contention that the libel is not a gross one. But this is not necessarily so. A libel may be gross, and yet the conduct of the plaintiff, in relation to the matters in issue or cognate thereto, may have been such as to disentitle him to more than nominal damages. This is probably the position which the *Times* intends to take up.

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An Embarrassing Predicament.—Her Majesty's Advocate has many privileges and immunities, and, amongst others, the right of suing and being sued free of all personal expense, and sometimes to personal profit, in all actions affecting the rights of the Crown. But the privilege is not without its embarrassments, as is evidenced at present by the fact that for the first time, we daresay, since the institution of the office, the Lord Advocate finds himself in the position of a defender in an action of breach of promise of marriage and seduction. How has this alarming state of matters been brought about? It may strike the uninitiated that, as his Lordship can be sued only in two capacities, as an individual or as representing the Crown, if it is not himself, it must be his sovereign against whom the gross imputation is directed. The fact that the pursuer is a female, banishes this impudent suggestion, and leaves the Lord Advocate to meet the calumny alone. The situation is aggravated by the fact that the

defender does not repudiate the impeachment: he pleads not a denial of guilt, but an absence of funds. He did it, but he has not the wherewithal to make good the wrong. We do not know whether the defender has yet applied for the benefit of the poor's roll. It is right that before passing from the subject we should mention that his Lordship is designed in the summons as representing the Crown as *ultimus hæres*, and that the allegation is that a deceased seducer having died intestate, and the last of his race, his estate has fallen to the Crown, which must make good the damages thereunto. The defence is simple. No estate has yet come into the hands of the Crown.



Lowther in excelsis.—Fame is an arbitrary commodity; and it is doubtful whether the Right Honourable James Lowther, when as Chief Secretary for Ireland he helped to wreck the Government of Lord Beaconsfield, bulked so prominently in the public eye as does the same gentleman now, when acting as one of the judicial referees in a turf dispute between two prominent members of the Jockey Club. As the reference was a judicial one, arising out of a pending slander cause, there was nothing out of the way in the use of a law court being allowed for it. But in taking possession of the Bench, the arbiters displayed an ignorance and a presumption which would hardly have been looked for in such men of the world. Last year the Lord Chief-Justice stretched a point of courtesy to allow the Vice-Chancellor of the Duchy of Lancaster to sit upon the Bench, but he very properly drew the line at the officials of the Jockey Club. The House of Commons adjourns over the Derby day; but this is the first occasion on which we have known of a *cause célèbre* being adjourned over a whole race meeting, as this inquiry was over the Ascot races.

Special Articles.

THE DEAN AND THE DEMAGOGUE.

ON the morning of 12th ulto., the members of the legal profession throughout Scotland read with incredulous astonishment the statement that the Dean of Faculty, Q.C., M.P., Privy Councillor, and ex-Law-Officer to boot, had presided at a meeting held at Alva to hear an address by Mr. Cunninghame Graham, M.P., the Socialist agitator. Mr. Cunninghame Graham has made some stir in Scotland during the last year or two, by his violent and inflammatory harangues to the working classes; but his chief claims to a notoriety that reaches further than the bounds of this northern kingdom, are his suspension in the House of Commons for flagrant defiance of the chair, and his conviction in a metropolitan criminal Court for the part he took in connection with a Sunday riot in the streets of London. A more unsuitable recipient of the recognition and compliment at the hands of the head of the legal profession in Scotland, implied in presiding over his meeting and introducing him to an audience, it is hard to imagine; and in consenting to play this part, the Dean of Faculty seems to have been guilty of a serious indiscretion.

Mr. Cunninghame Graham arrived at the meeting late. He had spent the afternoon in addressing sailors on strike at Leith, where he took occasion to ridicule men "who worked in white shirts," and where his companion, Mr. Keir Hardie, demanded, "Why should the working men not display violence? Why should they not? What else would terrorize the upper classes except violence? What else would place the working men in power except violence?" The bulk of Mr. Cunninghame Graham's speech at Alva was the usual Socialistic rant, and the harangue was remarkable chiefly for its contemptuous references to the political party of which the Dean is so distinguished an ornament, and the cynical frankness of the speaker's admission that he had "no opinion upon the Irish question, and turned round because Mr. 'ladstone did so." It must not, however, be assumed that

because ravings like those of Mr. Cunninghame Graham are unutterably foolish, they are altogether harmless; and the Dean, as he listened to them, can hardly have been cheered by a comfortable conviction that he had done a good turn by the miners and weavers of Alva in opening the floodgates of this frothy flow of foolishness and fury. There is one sentence in Mr. Cunninghame Graham's speech which we cannot forbear to quote. "There are bad times coming, and in the near future Parliament will be broken into by an angry mob, and it behoves the people to be ready for these times, and statesmen to look out for measures of relief for the starving crowds when the emergency arises." If Mr. Balfour had been entrapped into taking the chair at the meeting, it was time for him, as a Privy Councillor and ex-Law-Officer, to leave it when the speaker got the length of menacing the Houses of Parliament with the incursion of an angry mob. But no, the chairman kept his place, and appears to have conveyed a vote of thanks to the speaker at the close of the address.

The incident is in every way to be regretted. The Dean of Faculty is pre-eminently the conservator of the traditions and decorums of the profession, and, although he is not debarred from political work, his public action ought to be beyond cavil. Where the propriety of a proceeding is even questionable, another man may risk it, but not the Dean of Faculty. In regard to all the proprieties, the Dean should be like Cæsar's wife. It was not seeming that the head of the legal profession, and especially an ex-Law-Officer, who has been in the past, and may be in the future, responsible for the peace of the country, should openly and intimately associate himself with a man who had so lately been in such sharp conflict with the law in London. A Privy Councillor, too, ought not to have constituted himself the patron of the only man against whom during the present decade the Queen's troops have had to descend into the streets. No doubt there is something to be said even for Mr. Cunninghame Graham. He is a great deal better than most of his surroundings. He is good-hearted and of gentlemanly feeling, and is more a mountebank than a malefactor. But the significance of such patronage as the Dean has accorded, and the future embarrass-

ment to which it may lead, depend not so much upon what a man is as upon what he is esteemed. To the general public, who know nothing of the gentleness and the simplicity which redeem him, Mr. Cunninghame Graham is not a child-hearted mountebank, but a turbulent Socialist, who has shown signal contempt for lawful authority. And even were it that Mr. Cunninghame Graham was known to be a mere mountebank, the Dean of Faculty is as out of place in presiding on a mountebank's platform at Alva as in hurling a perambulator in Princes Street. Jealousy no less for a reputation and a career second to none in the profession, than for the high office which he holds, warrants us, we believe, in giving public expression to a sense of disapproval and dissatisfaction which seem to be almost universal in the profession. Mr. Cunninghame Graham told the sailors at Leith that he "liked to see the working men come out in great masses, even if it were only to see a dog-fight." We disagree with Mr. Cunninghame Graham in this, as in everything else. We dislike to see working men turn out to a dog-fight, but we dislike infinitely more to see the Dean of Faculty presiding at a puppet show. There is only one gratifying feature in connection with this most regrettable incident. In consenting to preside at Mr. Cunninghame Graham's meeting, the Dean displayed characteristic good-nature, for was it not Mr. Cunninghame Graham who only last year denounced the right honourable gentleman as a "putrid Whig"?

DIVORCE REFORM IN ENGLAND.

A BILL has been introduced in the House of Commons by Dr. Hunter for the assimilation of the divorce law of England to that of Scotland. The measure proposes to effect two changes—(1) to allow divorce for wilful desertion for four years; and (2) to allow a wife to obtain divorce on account of the husband's adultery without the addition of cruelty. Every Scottish lawyer, familiar with the humane operation of the law of divorce for desertion, will approve of the former proposal; but it will, no doubt, meet with strenuous opposition from a section of the English public who have religious

or ecclesiastical difficulties in the matter, with which we are not troubled, to any great extent, on this side of the Border. The second proposal is a more doubtful one, and there is a good deal to be said for the view, that under the liberal interpretation which is given to the term "cruelty," the English rule is the preferable one. Whatever be the religious or moral difficulties in the matter, there can be no doubt that in the judgment of civilised mankind, and still more in that of civilised womankind, carnal connection with another than the spouse is infinitely more degrading in a woman than in a man. Moreover, in the case of a woman it is a far more serious obstacle to the maintenance or renewal of marital relationship. Nine people out of ten despise the merciful cuckold; ninety-nine out of a hundred admire the forgiving wife. Nobody but a maudlin sentimentalist regards the heroine of "The Profligate," who abandons her husband on discovering that he had not been quite straight in his foolish youth, as other than an insufferable vixen. Nobody will blame the man who separates himself from a wife on discovering that prior to marriage she had led an immoral life. We say not one word in disparagement of the worth of spotless purity in the married or single of either sex; all we affirm is that there are degrees of degradation and consequently degrees of guilt, and that the degradation and the guilt are infinitely greater in the case of a woman than of a man. It seems questionable whether the English law errs, in recognising this difference in the gravity of the offence in the two cases. Take the case of a husband in India, working for the support of his wife and family in England, who on a single occasion forgets himself with a chance female whom he knew not before and consorts not with again. Far be it from us to say that he was not to blame; but is it a wise or humane law which exposes him for this offence to have his home broken up, his family life destroyed, and himself made a pariah in all decent society? Promiscuous profligacy on the part of a husband, or intercourse with another, coupled with the transfer to her of the affection which is the due of the wife, are properly grounds of divorce; but there are serious objections to a law which attaches such terrible consequences to even a single and casual act of offence. It is not, perhaps;

an altogether irrelevant consideration, that intercourse of a married man with an unmarried female is not adultery by the law of Moses, or prohibited by the Seventh Commandment.

Divorce is granted for adultery, not because adultery is sinful. Robbery is just as heinous, but a conviction of robbery is no ground of divorce against the convicted spouse. Adultery is a ground of divorce, because adultery is regarded as an *irretrievable* breach of the marriage covenant, as incompatible with the maintenance of that reciprocal relationship, that mutual devotion, which marriage establishes, and in which the chief value of marriage consists.

Now adultery in any form, on the part of a wife, implies a rupture of the marriage relationship, a transfer of that affection without which marriage is an irksome yoke. But, on the other hand, it is notorious to all who have any knowledge of the world, that whilst profligacy or a continued *liaison* with another has the like effects in the case of the husband, an incidental *lapsus*, on an occasion of absence, excitement, or indulgence in drink, is not incompatible with sincere and enduring marital devotion. The English rule, therefore, which requires in addition to an act of adultery such cruelty, either real or constructive, as necessarily implies a rupture of marital relationship, appears to us to have much to commend it, and ought not lightly to be interfered with.

THE ADVOCATES' WIDOWS FUND.

THE annual report of this Fund is before us, and is in some ways a remarkable document. The Fund was founded by an Act of Parliament passed in the year 1830, and as all members of the bar who passed subsequently to 1st January 1832 are contributors, the scheme is now fully mature. The financial success of the Fund has been enormous, as is evidenced by the facts that the amount of capital at 15th May 1889 was £188,629, 10s. 1d., and that the income from invested funds is at present far more than sufficient to meet all the annual charges without drawing upon any of the other sources of revenue.

The widows are divided into three classes, according to the scale of payment chosen by their husbands, the annuities being at present £66, £88, and £110 per annum. Every intrant to the Fund pays a sum of £55, with an addition, according to his age, for every year above 25. In addition to this, there is an annual contribution by every member who has not compounded by payment of a capital sum. This contribution is at present £2, 15s., £4, 10s. 10d., or £6, 6s, 8d. for bachelors, and £3, 17s., £6, 7s. 2d., or £8, 17s. 4d. for married members, according to the scale chosen. There are in addition taxes upon marriage, and certain fines for default. The total income from these sources last year amounted to £3201, 1s. 3d., which was unprecedentedly large, there being no fewer than 28 intrants. There are at present 344 contributors and 74 widows. After making provision for the annuities of all existing widows, each contributor is interested to the amount of upwards of £400 in the Fund.

Every seven years there is an actuarial examination of the state of the Fund, and it is then competent for the contributors to vary either the widows' annuities, or the annual rates, according to the condition of the Fund. On the occasion of the last audit, some four or five years ago, the annual rates were reduced: on a previous occasion the widows got an increase in their allowances. The report of the actuaries on the last occasion was generally accepted without question or examination. But any one who took the trouble to look into it carefully saw that it was extravagantly pessimistic, and that the state of the Fund would have warranted much greater liberality. Unfortunately the great majority of mankind have a horror of figures, and a superstitious reverence for those who handle them. The ordinary man would no more dream of calling in question an actuary's reasoning in a matter of calculation, than of disputing a Sanskrit root with an Oriental scholar. But the predictions of those who had the courage to look into the matter and to differ from the actuaries, have been amply fulfilled. The Fund, although now mature, is accumulating at the rate of upwards of £3500 per annum (it was £4577 last year, but that was exceptional), at the expense of present contributors and to the detriment of widows of past subscribers, and for the benefit of a posterity to whom neither

the one nor the other owe anything. If the present rate of increase be maintained, and no further alteration be made in the rates or the annuities, the Advocates' Widows Fund, with accumulated interest, will pay off the National Debt in 150 years.

The income last year from interests and dividends alone amounted to £7022; the total ordinary expenditure, including the annuities, amounted to £5508. Now, as we already pointed out, the Fund is quite mature, and therefore, for the present, the income from accumulated funds is ample to meet all the charges without calling upon the ordinary annual income from intrants' contributions, annual rates, etc. No doubt the number of intrants to the Faculty has shown a considerable increase of late years, and last year was phenomenal; but the state of business does not warrant the belief that this increase will be maintained, and the Faculty has been in the main a stationary body as regards numbers for centuries. The reasonable probabilities therefore are, that were all payments abolished, the accumulated fund would be sufficient to allow the present annuities to all advocates' widows in all time coming. No doubt that would be an absurd solution to the matter, for all intrants ought certainly to be made to pay; but the consideration shows how startling is the present position of the Fund, and how largely the widows' annuities may safely be increased. When a fund of this kind is mature, further accumulation is inequitable as benefiting the future at the expense of the past and the present, and the aim ought to be in adjusting the Fund for seven years to make the expenditure during the period just meet the income. We observe that the same pessimism as characterized the calculations of the actuaries is displayed in the present report. The income for the current year from all sources, other than interests, is estimated at £1161, 17s. 6d. from annual rates. Not only is nothing allowed for estimated penalties or marriages, but there is not one penny estimated as coming from intrants. As the Faculty has never, during the present century, been without an intrant, and as the number has averaged upwards of a dozen per annum for many years, and has never fallen below nine in the present decade, this caution shows just about as much contempt for the law of averages as if the Chancellor of the Exchequer,

in framing his budget, were to count upon no return for the death duties owing to the uncertainty of human decease.

THE OREGONIAN CASE AND THE AMERICAN COURTS.

THE *Albany Law Journal* is very indignant at our strictures upon the action of the Supreme Court of the United States in this case. Our contemporary does not profess to be in possession of any account of the case other than our own, which it quite justifiably rejects as *ex parte*; and accordingly its indignation rests not upon knowledge of the merits of the controversy, but upon inherent conviction that the Supreme Court could not possibly do anything to deserve our censure. Now we frankly admit that our language was warm—warmer than is usual or generally desirable in legal criticism, but the moral aspects of the question, of which our contemporary is not in possession, were, we think, such as to justify no inconsiderable heat. The *Albany Law Journal* speaks of Scottish capitalists being over-reached. We still prefer our own description that it was a case of Scottish investors being swindled. The story is short and simple. A company is formed in Dundee for the construction and letting of a railway in Oregon. To this company a capital of some £500,000 is subscribed, not for the most part by wealthy capitalists, but by hard-working people, who have made their money by patient industry, and are anxious to better themselves and increase the hard-earned provision for their families. The company go to Oregon under a law which purports to give to foreign corporations the same rights and powers as domestic corporations of the same kind enjoy. By and by negotiations are entered into with a native company for a lease of the line. The native company is incorporated under a statute which allows of incorporation for any lawful purpose, and one of the purposes expressly set forth in its articles of incorporation is the taking a lease of a railroad. The bargain is completed. The American company enter into possession. A year or two pass, and then this company, having devastated the property, calmly announce

that they repudiate the bargain. An action is begun, and the Circuit Court of the United States rejects the contentions of the repudiators as "frivolous," and sustains the lease. An appeal is taken to the Supreme Court of the United States, and, after years of delay, that august tribunal sustains the repudiation, sets aside the lease, and in effect gives legal sanction to a barefaced breach of an honourable bargain. The result brings ruin and misery to hundreds who honestly invested their savings in a lawful enterprise, conducted by upright and honourable men, and who went to the United States, and entered into transactions there, confident that the privileges which statute expressly promised them would be upheld, and that bargains honestly made were safe to receive enforcement at the hands of the Federal Courts. We venture to affirm that such a result is unworthy of a rational or civilised system of jurisprudence.

Now it may be objected that this may all infer a stricture upon American law, but that it warrants no reflection upon the Supreme Court, which we are bound to assume correctly interpreted the law. This would be a just observation, if the American Court had been obliged unwillingly to give effect to a clear statutory provision. But the very contrary was the case. The difficulty of the Court was not to have to give effect to the statutory provisions, but to get over them. The natural reading of these provisions was admittedly all in favour of the Scottish company, and a strained construction had to be put upon them in order to permit of the result finally reached. The inference is obvious that this result was in accordance with the Court's conception of natural law or abstract justice. We do not accuse the Court, as our contemporary suggests, of being venal or partial; but we do accuse it of being warped by prejudices and possessed by prepossessions quite unworthy of an enlightened jurisprudence.

The way in which the judgment was reached may be recapitulated in a single word. It was not disputed that the American company was incorporated under a law which expressly provides that any lawful enterprise mentioned in the articles of incorporation shall be within the powers of the corporation. It was admitted that amongst the purposes

expressly mentioned in the articles of incorporation were both the constitution and the hiring on lease of a railroad. In this state of the law and of the facts, the United States Court held that, notwithstanding the apparently clear provisions of the general statute, it was unconscionable to suppose that a company should have power by such a statute both to construct and to hire railroads; and accordingly they held that the company in question had no power to hire a railroad. Again, the Scottish company came to Oregon under a statute the plain intent of which was to give to foreign corporations the same rights and powers as domestic corporations enjoy. It was not disputed that this was the natural interpretation of the language used. But, again, in face of the language of the statute, the United States Court held that it was unconscionable to suppose that such powers were really conferred upon a foreign corporation.

The whole story suggests a reflection which must often be present to the minds of those on this side of the Atlantic who have business relations with America. Why is it that such a sense of insecurity prevails in regard to all American investments? Why is it, for example, that it is easier to get 6 per cent. over real property in America, than 4 per cent. in this country. It is not that America is distant, for the electric wires and the ocean racers have brought America very near to our doors. It is not that America is a back-going country, for her expansiveness is tenfold greater than our own. It is not that American Government is unstable, for her constitution has stood the test of a century. But it is because of the insurmountable dread that the negotiations will be vitiated by a swindle, and that the swindle will be one for which the law will give no remedy. This dread is born of experience. The history of British investments in America is strewn with memories of swindles, for which the American Courts have been powerless to find redress. There are plenty of swindlers, in all truth, on this side the Atlantic, and an investor in a new company needs to be careful to whom he entrusts his money. But the investor on this side need be troubled with no apprehensions, that though the swindle be found out, the law will refuse to give him a remedy against it. The swindle may escape detection, the

swindler may be unable to make good the loss ; but it will not be the fault of the law if the wrong is not remedied. Now, why should it be otherwise in America ? The Americans are of the same race, and their jurisprudence has the same traditions as our own. One can well understand an old system, such as the Roman law was before Prætoorean intervention, or such as our land system was forty years ago, being warped by restrictions and technicalities which often render it impossible for the Court to give a remedy against undoubted wrong. But it is astonishing that it should be so with a young jurisprudence like that of America, and that these cases of wrong, against which there is no legal remedy, should abound. Take, for example, the circumstance of the Scottish Oregonian Company being foreign. One could understand a conservative, prejudiced, old country being exceedingly jealous of foreign intrusion, and unwilling to give facilities for foreign enterprise. But it is amazing to find a young free country, which owes so much of its development to the influx of foreign capital, so possessed by prejudice against according commercial privileges to foreigners, that even the Bench are so saturated with that prejudice that they cannot bring themselves to give effect to an express statutory provision, that in a certain State foreign corporations shall have the same privileges as native ones. There were at one time statutory restrictions upon the rights of foreigners in this country, and there are still statutory and common law disqualifications in different public relations ; but we should be sorry for the counsel who, at the bar of a Court either of superior or inferior jurisdiction in this country, urged it as a consideration affecting the validity and enforcement of a commercial contract, that one of the parties to it was foreign.

One can well understand that a jealous populace may place all sorts of restrictions upon foreigners, may prohibit their immigration, may forbid them to hold land, may impose disabilities upon their trading companies, and generally render it difficult for them to pursue any enterprise in the country ; and that Courts of law may find themselves reluctantly obliged to give effect to these restrictions and disqualifications. But in the matter here in question we find the very reverse to be the case. The populace through the Legislature are more

liberal than the Courts, and privileges which the Legislature has attempted to confer, the Supreme Court has striven to restrict and curtail. The vulgar populace welcomed the stranger, the enlightened jurists forbade him.

LEGAL PUZZLES.

WE intend from time to time to sharpen our wits, and try to sharpen those of our readers, by the suggestion of legal conundrums, and the attempt to solve them.

In future we shall state the puzzle at least a month before giving our attempted solution. The first puzzle which we here state is suggested by a case which has actually occurred at Montreal, and is, we believe, engaging the attention of a Canadian Court. We make our attempt to solve this puzzle below. Our solution of the second we reserve for a future number.

I.

"A., who has no issue living, but whose wife is pregnant at the time of his death, makes a will by which he bequeaths one-half of his property to the wife, and one-half to the expected issue should that issue be a boy, but should the issue be a daughter, two-thirds of his property is to go to his wife and one-third to the daughter. He dies, and the wife bears issue twins, a boy and a girl. How is the property to be divided?"

At first sight it might appear that the whole will was void through uncertainty, but this view will not bear examination. A settlement may be void as to certain particulars owing to uncertainty, but unambiguous bequests in the same deed will be sustained. Now, as regards the bequest to the widow there is no uncertainty. She gets an unconditional bequest of one-half of the estate, and a conditional bequest of one-sixth more, the condition being that a son shall not be born. But a son has been born, and therefore the condition has not been purified. There is accordingly no uncertainty to invalidate the widow's bequest of one-half of the estate. But it may be contended that though the will is not void by uncertainty,

it is voided by the birth of the extra child. The birth of a child, whether before or after the death of a father, no doubt voids his previously made will. But that is only where, but for the birth of the child, the deceased would have died childless. The birth of an additional child, whether before or after the father's death, does not render his will void. In the present case, death childless has not been contemplated. The will is made on the footing that the testator leaves a child behind, and there is no room, therefore, for the application of the rule that the birth of a child supersedes a settlement. The will, therefore, in so far as it contains any certain provision, must stand. There is no uncertainty, as we have pointed out, in regard to the bequest to the widow, and accordingly she may be dismissed with her half.

But the allocation of the other half of the estate between the children is attended with more difficulty. Two views suggest themselves. On the one hand, it may be contended that the principle of proportional diminution must be applied. Disposing of one-half of his estate, the testator has given away more than he had to give. It is as though a man with an estate of £3000 to leave, had bequeathed £3000 to one person and £2000 to another. In such a case each would suffer a proportional diminution. So here the share of the estate falling to the children falls to be divided between the son and the daughter in the ratio of $\frac{1}{2}$ to $\frac{1}{3}$, or of 3 to 2. This is specious reasoning, but it will not hold. The father has not left one-half to his son, *and* one-third to his daughter, but one-half to a son *or* one-third to a daughter. The legacies are alternative, not copulative. The father never contemplated the existence of a son and a daughter, far less left a bequest to each of them. The inevitable result is that the bequest to children is void by reason of uncertainty. No doubt there is an indication of an intention to favour a son, but this indication is too uncertain and indirect to be given effect to, or, more accurately, provision has not been made to give effect to it in the circumstances which have arisen; and however strong the indication of intention may be, a Court cannot supply the want of the provision necessary to give effect to it. The result, then, is that the widow takes one-half of the estate under the will, the children one-fourth each as next of kin on intestacy.

II.

"A. divorced his wife B. on the ground of adultery. Subsequently B. obtained fresh evidence which enabled her completely to vindicate her character by showing a clear case of mistaken identity, and the decree of divorce was reduced. Meanwhile A., who had acted in complete *bona fide* in suing his divorce, had, in the belief that he was once more a single man, promised marriage to C., and been intimate with her, the result being a child D. Thereafter A. had broken with C., and been intimate with E., who had borne him a child F. Subsequently to F.'s birth he had married E., who had thereafter borne him another child G. Upon obtaining reduction of her divorce, B. on her part raised an action of divorce for adultery against A. C. and E. raised actions for breach of promise of marriage and seduction against A. D., F., and G. all raised actions of declarator of legitimacy against A. What happened in the different actions?"

Correspondence.

(To the Editors of the Journal of Jurisprudence.)

SIRS,—Can you kindly enlighten me on the following point in electoral law? Non-payment of rates on the part of an occupier is a disqualification, and deprives the person of his right to vote. A lodger has not to pay rates, on the principle, presumably, that the rates pertaining to the premises which he occupies are already laid on in his landlord's assessment, and are recovered from him (the lodger) in his rent. Now in this district there are certain persons who have let apartments in their houses to lodgers, but who have not themselves paid their rates this year. Is not this non-payment of rates on account of the premises a valid objection to the qualification of the lodgers?—I am, etc.,

A SECRETARY.

[Yes, we *can* enlighten "A Secretary," but we *won't*. We are always glad to discuss speculative questions with our

correspondents, but "A Secretary" obviously wishes a gratuitous opinion for his guidance in his political work. Our columns are not open for such a purpose. We advise "A Secretary" to consult a solicitor, and, if necessary, to take an opinion of counsel.—*Ed. J. of J.*]

Obituary.

MR. COLIN RITCHIE M'CLYMONT, barrister (1873), died on 4th ult. The deceased, who was a native of Stranraer, had a considerable junior practice both on Circuit and in London.

THE HON. WILLIAM FRANCIS LITTLETON, barrister (1872), C.M.G., died on 1st ult. Mr. Littleton was the fourth son of the second Lord Hatherton, and he was born in 1847. He was private secretary to the late Sir Bartle Frere, and was made a C.M.G. in 1880.

MR. JOHN HAMILTON GRAY, a judge of the Supreme Court of the Colony of British Columbia, died on 5th ulto. in his seventy-fifth year. He was called to the New Brunswick Bar in 1837, and took silk in 1853. He was for some years in the Dominion Parliament, and he was appointed a puisne judge of the Supreme Court of the Province of British Columbia in 1872.

MR. EDWARD ARCHER WILDE, barrister (1858), Clerk of Assize on the Oxford Circuit, died on 17th ulto. at the age of sixty-three. Mr. Wilde was a brother of Lord Penzance, and a nephew of Lord Truro. He served for some time in the Indian Army before he came to the Bar, and subsequently he acted as secretary to his brother when the latter was a judge of the Courts of Probate and Divorce.

MR. ROBERT REEVES, barrister (1857), Q.C. (1880), died at Dublin on 6th ulto. He had for some time a considerable practice in the Chancery Court at Dublin, and he was appointed a Sub-Commissioner under the Irish Land Act of 1881.

MR. JAMES RITCHIE, solicitor, who died at St. Kilda, Dunedin, upon 5th May, was a son of the late Mr. W. H. Ritchie, solicitor, Town-Clerk of Dunbar.

MR. DANIEL MITCHELL, solicitor, Lerwick, was drowned upon 22nd June, whilst boating in the Shetland seas, through being accidentally pitched off a yacht by a heavy lurch. The deceased, who was about thirty years of age, was a young practitioner of much promise. He had been for several years in business on his own account, and he was Clerk of the Peace for the county.

MR. STUART M'WATT, solicitor, was drowned whilst gallantly attempting to rescue Mr. Mitchell. A son of Dr. M'Watt of Duns, he was in his twenty-seventh year, and had been engaged for some two and a half years in the Procurator-Fiscal's office at Lerwick, where he was much esteemed. Like so many who have recently lost their lives by drowning, Mr. M'Watt was deemed an expert swimmer. All honour to the gallant dead, but experience seems to teach that unless a man can swim easily for at least a quarter of an hour with his clothes on, it is throwing away a good life after a lost one to attempt a rescue by springing from a sailing vessel in a choppy sea.

Appointments.

ON the 4th inst., the Queen was pleased to confer the honour of Knighthood upon James Robertson, LL.D., Professor of Conveyancing in the University of Glasgow.

SIR GEORGE SHERSTON BAKER, Bart., barrister (1871), has been appointed Recorder of Barnstaple and Bideford, in room of Mr. Murch, resigned. Sir George has been Recorder of Helston since 1881, and he is on the staff of the *Weekly Reporter*.

MR. HENRY LONGLEY, C.B., barrister (1860), Chief Commissioner of Charities, has been created a Civil Knight Commander of the Bath.

MR. JAMES RUSSELL, C.M.G., barrister (1874), Chief-Justice of Hong-Kong, has received the honour of Knighthood.

SIR JAMES MARSHALL, barrister (1860), late Chief-Justice of the Gold Coast, has been created a Knight Commander of the Order of St. Gregory the Great, in recognition by the Pope of his services to the Catholic missions in West Africa.

The Month.

Widows' Provisions.—A Bill has been introduced into the House of Commons by Mr. Ambrose, which provides that when a man dies leaving a widow and no issue, and leaving real and personal estate not exceeding £500 in value, the widow shall take the whole, and when the estate exceeds £500, the widow shall take £500 for her portion before any distribution is made.



At the Parnell Commission.—A curious thing it was also to see how in that stifling, suffocating mass of spectators, the great ones of the earth found their level—and, I must add, found it with good humour. The desire to be present was so intense, and the applications were so innumerable, that each one seemed to feel only too thankful to be anywhere, and resented not in the smallest degree being buffeted, elbowed and compressed as by hydraulic pressure. I could mention some formidable names whose faces confronted me from this species of humble obscurity. Let me, however, name only two, one being the Lord Advocate of Scotland, who beamed all over on ultimately obtaining a few inches of bare board whereon to rest his weary limbs after hours of standing; and the other the President of the Royal Academy, who looked equally jubilant on being offered, at the same time, a seat that must have been about as comfortable as the Iron Cage. —*L. B. Walford in the Critic.*

Lawyers in Straits.—Among the curious incidents of the Licence Court last week was the application of a member of the Bar for a liquor licence. He thinks there is more money in liquor than the law business. This is true. The average law practice in Philadelphia is not quoted at a very high figure. An intelligent observer informs me that it will not reach \$500 per annum. The profession has been seriously affected by the growth of trust and real estate title companies, by the abolition of auditorships in the Orphans' Court, and by the increasing disposition of the public to shun law because of the delays, cost of litigation, the badgering of witnesses, and general vexation attendant upon such contests. The title companies will do the work which lawyers once did for a third or a fourth the amount of fees paid the attorneys, and will support their guarantees against liens and flaws in the title by their capital, and by the permanency of the institution, a consideration not to be lost sight of. Many young lawyers have found a refuge in these companies, where they are acting as search clerks, and in other capacities. As applied to real estate, law was never cheaper. These institutions press heavily on the young barrister of the day, and drive him to the less congenial and less remunerative departments of practice. There is less incentive to study the lore of real property, so that the coming lawyers are likely to be less profound in this branch of legal study than the old race of practitioners.—*Germantown Telegraph.*



Out of the Frying-pan!—A lawyer of Temple Court was looking over some papers his German client had brought, and every signature made him shudder, as it stood,—

“A. Schwindler.”

“Mr. Schwindler, why don't you write your name some other way,—write out your first name, or something? I don't want people to think you are a swindler.”

“Vell, my Gott, sir, how much better you dink dat looks?” and he wrote,—

“A dam Schwindler.”



Police Supervision.—At Leeds Assizes, Mr. Justice Hawkins made some remarks upon this subject. He does not believe in it. He had never known it do any good. It prevented people who had been in trouble from obtaining honest work when they came out of prison, because a man had not much chance of recovering his character if he was obliged to report himself to the police as a convicted thief every month.



A Public Trustee.—The Lord Chancellor has prepared a measure for the creation of a public trustee for the management of trust estates.



"AND so you have received a divorce from that vagabond husband of yours, Mrs. Smith?"

"Yes, I am glad to say that I have."

"Didn't you feel quite overpowered when you heard the decision of the judge?"

"Not exactly. I felt sort of unmanned, so to speak."



"A DISCRETION which is capable of review is not known to the law."—*Per* Mr. Baron Pollock in the St. Paul's reredos case.



The late Mr. Irving Bishop.—The *Albany Law Journal* says:—"It seems to us that the autopsy on the body of the unfortunate mind-reader Bishop was an outrage, without the semblance of excuse or legal justification. The man had apparently died a natural, although sudden death, but in public, surrounded by friends, and without the slightest suspicion of foul play. In these circumstances a coroner would probably not have been justified in holding an inquest; certainly not in ordering an autopsy. But there is no pretence that the doctors had any authority from a coroner. Indeed, they assert that their purpose was to anticipate

the coroner's possible action, 'in the interests of science.' And so, before the man had been apparently dead five hours, they proceed, without waiting for any expression of a wish or any authority from his absent relatives, to carve the poor man's remains. He probably was not dead. 'He was undoubtedly dead, for *rigor mortis* had set in,' said they. How do they know it was *rigor mortis*? It is indisputable that he had had just such seizures before, and had lain apparently dead for many hours, even days, at a time. He had been labouring under a tremendous and unusual mental strain. But no matter whether he was dead or not. It is probably impracticable to hold them for manslaughter, but they should be punished to the extent of the law for an unwarranted dissection or autopsy. These indecent men were eager to be the first to discover the secret of Bishop's wonderful and exceptional mental power. To gratify their morbid curiosity, and get ahead of the other doctors, they cut up the victim's body before he was fairly cold, and without any more authority than they had to kill him. The thought that perhaps the poor man was conscious of their horrid preparations is one that humanity shrinks from dwelling upon. If this mob-law is the law of the city of New York, we advise strangers to keep away. If one's wife or child goes there visiting, and dies suddenly in the street—as Col. Chatfield, of Cincinnati, well known in this city, died there a few days ago—some super-serviceable doctor, 'in the interests of science,' may carve the inanimate remains without observing the forms of decency, or waiting to see if death has really supervened. If this kind of thing goes on, there will be apt to be genuine *rigor mortis* among the doctors. If Bishop had a father or brother, he would be excusable for clubbing them till they were cataleptic, and hoping for another of their sort to come along and carve them up—all 'in the interests of science.' Dr. Clark Bell's coming convention would better look into this performance."

It is now said that the doctors are to be let off, on account of their ignorance of the law; but the doings and utterances of a certain section of the medical profession in New York are pressing home the painful conviction that a New York doctor wants hanging.

"HAVE you," asked the judge of a recently convicted man, "anything to offer the Court before sentence is passed?"

"No, your Honour," replied the prisoner; "my lawyer took my last copper."

* * *

An Arcadian Judge.—In the course of a recent trial before Mr. Justice Hawkins, the plaintiff said that he was a bookmaker. Mr. Justice Hawkins: "What is a bookmaker? At first sight he would seem to be a literary man." Witness: "A bookmaker is supposed to be a banker." Mr. Justice Hawkins: "I suppose I may take it that the banker is possessed of money to start with?" Witness: "Yes, and he has clients to bet with him. If they back a horse with him and it wins, they are supposed to have their money." Mr. Justice Hawkins: "Do clients back horses with their bankers?" Witness: "Yes, and if the horse wins they get their money." Mr. Justice Hawkins: "Sometimes." The simplicity of Mr. Justice Hawkins is quite affecting. When a golf-club carrier is examined before the founder of the Biarritz Golf Club, we shall look for the query from the Bench: "What is a caddie? At first sight it would seem to be a utensil for holding tea."

* * *

A BILL recently passed by the Nebraska Legislature provides: "It shall be unlawful for any person to fire off or discharge any pistol, revolver, shotgun, rifle, or any firearms whatsoever on any public road or highway in any county of the State of Nebraska, or within sixty yards of such public road or highway, except to destroy some wild, ferocious, and dangerous beast, or an officer in the discharge of his duty."

* * *

The Faculty of Advocates and Private Bill Legislation.—The Committee of the Faculty on Private Bill Legislation have prepared a report upon the Government Bill which has been approved of by the Faculty. In the course of that report the Committee say: "The main principle on which this Committee has been authorized by the Faculty to proceed is,

that private Bills relating to Scotland should at the Committee stage be inquired into and tried locally by a Commission in Scotland, and not by Select Committees of both Houses of Parliament; and that the reports of this Commission, issued on reference or remit by either House, should be accepted by both Houses successively, as equivalent to, and coming in place of, the reports of their own Committees. On this plan, which is the same as that proposed by Mr. Stanhope, and recently recommended by the Joint-Committee of Lords and Commons to be put in operation for the three kingdoms, each House of Parliament retains its full power over every private Bill at the first, second, and third reading; and the only difference from present procedure is that the work done by Select Committees at Westminster is left to be done by a Commission sitting in, or as near as may be to, the locality primarily and directly affected by each Bill. Another plan, which, however, has not been recommended by the Joint-Committee of Lords and Commons, is that of Mr. Courtney, the chairman of Ways and Means. It involves the entire separation of all private Bills from ordinary parliamentary procedure, their reference to a permanent Commission, before which Bills may be initiated at any time, independent of the parliamentary session, and which shall decide upon such Bills, and the objections to them, subject only to its final decrees being laid before Parliament, and not objected to by either House within a limited time. On either plan, whether that of Mr. Stanhope or that of Mr. Courtney, Provisional Orders, when contested, might be tried before the intended Commission. The present Bill for Scotland follows in the main the plan of Mr. Stanhope, though it omits the power suggested by him to try contested Provisional Orders before the Commission.

“Three amendments only have occurred to the Committee of Faculty as proper to be made upon this Bill, viz.: (1) That (in the view of a large majority of the Committee) the constitution and mode of appointment of the Commission might be improved, by consideration of the suggestions on this subject to be found in the report of July 1887, the provisions in Mr. Craig Sellar's excellent Bill of this session for the three kingdoms, and the already existing provisions for a

Commission acting in Scotland under the Railway and Canal Traffic Act, 1888. (2) That the Commission projected for Scotland should, after the necessary changes on the Standing Orders, take up Bills brought in at any period of the parliamentary session, and not at one fixed date exclusively, as is the rule at present; and that the Commission should have power to report not only in the session of original reference, but in a subsequent session, notwithstanding a prorogation or even a dissolution, all as provided in sections 10 and 14 of Mr. Craig Sellar's Bill. (3) That Bills once determined to be private Bills should not be withheld from the Scottish Commission because of their 'exceptional character and magnitude,' but that all private Bills and Provisional Orders, where the works sought to be authorized are situated in Scotland, or where the statutory powers asked for are to be exercised in Scotland alone, should be tried and reported upon by the Scottish Commission.

"Recognising, as the Committee do, the peculiar difficulties in the way of any such measure as that now under consideration, and the great importance to Scotland of the Bill, the Committee consider it their duty to recommend to the Faculty to approve of this Bill, subject to these amendments, or even without them, and to urge that it should be passed into law."

In plain words, the Faculty think the Bill might be better, but by all means they want the Bill. Their criticism is tame indeed after the fiery fury of the Edinburgh busybody, who denounced the measure as "a proposal to take away their blood-bought liberties from the people of Scotland, and to hand them over to the keeping of the irresponsible judges of the Court of Session."

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Novel made Law.—Novelists, as usual, are in so far astray. The author of "A Daughter of Eve" represents that a will may be set aside because "the next-of-kin are not mentioned," and makes a lawyer advise his client that she cannot waive her dower right, except by joining in a conveyance with her husband, or accepting a provision by will instead. A graphic

artist may be pardoned if he makes a mistake in counting a Scots criminal jury; but Mr. Frederick Noël Paton is too thorough a Scot to be pardoned when in "Body and Soul" he puts only twelve men on the panel in a murder trial at Edinburgh.



Pactum illicitum.—The Supreme Court of Kansas has held that a contract between attorneys-at-law and persons engaged in the illegal sale of intoxicating liquors, providing that the attorneys shall for one year, for the monthly compensation of eighty dollars, defend all cases brought against such persons for violations of the prohibitory laws, is against public policy and wholly void.



Lord Justice Bowen.—It is rumoured that this eminent judge may become Master of Balliol. The Lord Justice is a distinguished scholar, and he finds much of the work of the Appeal Court irksome, especially since his health became enfeebled. His retirement would be a great loss to the Bench, for, in the opinion of many, Lord Justice Bowen is the strongest judge upon the English Bench.



Business in the English Law Courts.—There are loud and deep complaints in the English law journals at the state of the rolls and the depletion of the Bench by judges sitting on the Royal Commission, going on circuit, and so forth. The Court of Appeal, on the other hand, is well up to date with its work; and so far is Court No. II. forward, that what in Scotland we are familiar with as a transfer, has taken place from Court No. I. It is said that the places of some of the judges going on circuit will be taken by some of the Lords Justices sitting at *Nisi Prius*.



A High-spirited Thief.—Enos Basham, of Summers County.

West Virginia, is not to be trifled with. In September last he was sentenced to four years' imprisonment for grand larceny. Now, Governor Wilson of that State has pardoned him, on the ground that he is "not of that degree of intelligence to make him capable of distinguishing right from wrong." But Enos declines to accept pardon on such grounds, and refuses to leave the penitentiary. He declares that he has "more sense than Governor Wilson has shown in his whole term." We commend Enos' resolution. If he has "not that degree of intelligence to make him capable of distinguishing right from wrong," it is much better for society that he should remain in prison.

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Sunday Cigars for the Sick.—Every one knows that the quantity of ardent spirits sold or used "for medicinal purposes only," is so great that if only fairly divided it ought to cure all the ills that mankind is heir to. That spirits are medicine, is proved by an induction so wide that none but the most fanatical abstainers venture to dispute the proposition. But the claims of tobacco have never received such general recognition. It is true that cigarettes are recommended for asthma, and that in some cases the after-breakfast pipe is praised as friendly to a well-regulated digestive economy; but this recognition is very partial, and the cigar, as a health-restorer at all events, has hitherto been friendless. A claim has now at last, however, been made on behalf even of the cigar, and that not over the third one with the fourth whisky, or even at a medical convention, but solemnly in a court of law. The only judicial recognition which the cigar has hitherto received is Sheriff Berry's recent decision, that refusal to abandon the weed does not justify a refusal to fulfil an engagement to marry. But on the present occasion the cigar was not so fortunate. By the laws of Massachusetts, Sunday trading is prohibited, but there is an exception in favour of "the retail sale of drugs and medicines." In a prosecution for an offence against this law, the accused pled that the cigars were drugs or medicines. But the Court rejected the plea. The following passage from their judg-

ment may be summarized in a word, "We are not so green as you take us:"—"If upon the facts of this case, keeping the defendant's shop open to sell cigars was merely keeping it open to sell drugs and medicines, the instruction was erroneous; but if, as a matter of law, it was keeping it open for a purpose other than that of selling drugs and medicines, the instruction was correct. Ordinarily, whether a substance or article comes within a given description, is a question of fact; but some facts are so obvious and familiar that the law takes notice of them, and receives them into its own domain. If the proof had been that the shop was kept open for the purpose of selling guns or pistols, it would hardly be contended that the judge might not properly have ruled that the sale of these articles was not a sale of drugs or medicines. The Court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinion of witnesses who offer to testify that they are. Cigars are manufactured articles familiar to everybody. The materials of which they are composed are carefully prepared and put into form, until they lose their original character as mere materials and become articles of commerce, known by a new name and adapted to a particular use. We are of opinion that cigars sold by a tobacconist in the ordinary way are not drugs or medicines within the meaning of those words as used in the statute. Many things which are not in themselves medicines may be put to a medicinal use, and when so used they may become medicines. But there was no evidence in the present case that the cigars which the defendant sold were used or were intended to be used as a medicine, or that the defendant kept his shop open for the purpose of furnishing cigars to be used medicinally. The instruction must therefore be construed in its application to evidence of an ordinary sale of cigars, and so applied. We are of opinion that it was correct."

* * *

New Wine in Old Bottles.—Under this head Mr. Seymour D. Thomson writes in the *Green Bag*:—

"Nothing strikes the intelligent layman with more astonish-

ment than the way in which lawyers reason when they are called upon to decide a new question. They do not reason at all; but they begin to hunt back through the old musty books to find some analogy on which to decide it. They go back to year-book times, at least to the times of Coke and Bacon, to find if some judge has not decided some similar question, thereby making a rule for us to follow in the full blaze of the nineteenth century. If these lawyers would read history instead of law, it would perhaps make this habit less frequent.

"England in the time of Coke and Bacon had probably less than three million inhabitants. Its roads were nearly impassable during most of the year, so that intercommunication was extremely difficult. The city next in size to London was Bristol, and London had more than twenty times the population of Bristol. Carriages mired in the mud in the principal streets of London. Pedestrians jostled each other and fought for the wall, so that to 'give the wall' is still a figurative expression in our language. Where ducal palaces now stand, there were then open squares covered with ashes, dumpings of all kinds, offal thrown out from kitchens, dead dogs, dead cats, and the like. Even the nobility ate with their fingers, as the Turks do yet. Forks were first introduced from Italy in the reign of Queen Elizabeth. The island was in a state of constant political and social turmoil. The highways in the immediate vicinity of London were unsafe by reason of highwaymen. The northern Border swarmed with bandits scarcely more human than our Apache Indians. The indifference to human life was something that we can scarcely understand now. The brutality of the judges absolutely justified the expression of Shakespeare, 'Your hungry judge will hang the guiltless, rather than eat his mutton cold.' Torture was still practised; and the last prisoner was put to torture in the Tower of London in the year 1640, the year the celebrated Long Parliament met. Prisoners were still tortured in Scotland at a later day; and the Duke of York, when governing that portion of the island during the reign of his brother, Charles the Second, was accustomed to gratify his ferocious and detestable nature by having prisoners tortured in his presence. Old women were

tried on the charge of being witches, and found guilty by the verdicts of juries, and put to death, even in a Court presided over by a judge as enlightened and humane as Sir Matthew Hale. A prisoner was not allowed counsel, because no barrister was allowed to speak against the king. Trial by battle was customary, on the fantastic theory that God would not suffer the wrong to prevail; and it has been but seventy-one years since this relic of barbarism was abolished. Blood flowed for political offences. Atrocious and cruel penalties were annexed to crimes of a minor character. The stealing of a chicken was a capital felony.

"In fact, our ancestors of those days were barbarians, not as far advanced as the Bulgarians of our own time. When, therefore, we have a new question of law to study, why should we go back and try to find what the opinion of Lord Coke, whose infamous persecution of Sir Walter Raleigh can never be forgotten, was on the question? Why should we try to find what Sir Francis Bacon, who bought and sold justice, thought about it? Why, in short, should we not stop rummaging the old books, and do a little thinking for ourselves? Our ancestors in their day did their parts as well as they could, with the light they had, and amid such surroundings as they had. But, as compared with us, they were barbarians compared with the civilised man. In intellectual stature they were children compared with the moderns."

Surely the prayer, "God gie us a guid conceit o' oorsels," must indeed be answered, when we "moderns" are satisfied that Bacon and Coke, and Shakespeare too, we suppose, in intellectual stature were "children compared with the moderns"!

Reviews.

Bench and Bar Reminiscences of One of the Last of an Ancient Race. By MR. SERGEANT ROBINSON. London: Hurst & Blackett. 1889.

THIS is an interesting and fairly well-written work. The book is in no sense an autobiography or memoir of the writer; indeed, Mr. Robinson keeps himself carefully in the background, and is content, in the main, to record the doings and sayings of his contemporaries during the long sixty years that have rolled away since he was called to the Bar. Mr. Robinson has the years and experience of a Nestor, but he has none of that venerable hero's fond regrets for the past, none of the *laudator temporis acti* spirit. He believes not merely that the world is improveable, but that it has improved and is improving; and that in many ways, notably in the decadence of hard drinking, and of the irregularities in procedure which hard drinking led to, the improvement is manifest in the Bench and the Bar. Arabin figures in these pages as a typical representation of the questionable old times, and of the unseemly roughness that disturbed the decorum of the Courts of justice of fifty years ago. Here is one of the more amiable reminiscences of that worthy:—

"In sentencing a prisoner who had been convicted of stealing property from his employer, he thus addressed him: 'Prisoner at the bar, if ever there was a clearer case than this of a man robbing his master, this case is that case.'"

On another occasion, Arabin, in pronouncing a light sentence, said: "Prisoner at the bar, there are mitigating circumstances in this case that induce me to take a lenient view of it, and I will therefore give you a chance of redeeming a character you have irretrievably lost."

There are a number of anecdotes, too, about Charles Phillips, who, like Mr. Sergeant Ballantine, knew hardly any law, but whose "horticultural eloquence" always told with great effect upon a jury. Phillips has been blamed for his conduct of the famous Courvoisier trial, but Mr. Robinson thinks

that he was misreported, and has been unfairly treated in the matter. It is remarkable, in connection with the trial, to read that even the dock was crammed with strangers, who crowded in upon the prisoner. Contact with crime thus voluntarily sought after is not so disagreeable as when it is forced upon one, as happened once to the writer when standing in the doorway of a Swiss Court-house during the lunch hour. He felt a tap upon the shoulder, and was accosted by the man on trial for murder: "Monsieur, voulez-vous me permettre à sortir?"

This is a story of Phillips, who was an Irishman:—"Phillips once detected a witness kissing his thumb instead of the Testament, a practice very common among certain quasi-religious people, who thought that whatever risk they ran by false swearing in this world, it would not prejudice them in the next. He said to him, after a proper rebuke, 'You may think to desave God, sir, but you won't desave me.'"

Another good anecdote is told of Sergeant Adams, who, trying once a case of nuisance, had given the jury, in his summing up, a prodigiously long definition and explanation of the offence. Before they retired, he expressed a hope that the jury had understood the points he had laid before them. "O yes, my Lord," said the foreman, "we are all agreed that we never knew before what a nuisance was until we heard your Lordship's summing up."

Mr. Robinson has a high admiration for Southgate, whose remarkable career he justly cites as one of the most striking examples of the triumph of mind over bodily infirmity in the annals of human achievement. The description of Clarkson, at one time a well-known Old Bailey pleader, is worth quoting.

"Clarkson's was a very corrosive style of oratory, and he was generally said to be much fonder of his *specie* than of his species. He could shed a tear or two on occasion, but he did not keep them well under command. He generally exhibited emotion in the wrong place, sometimes long after every one else had finished."

This reminds one of the story of an occasion when a witness, Sarah Money, was called near the adjournment hour,

but was not found in attendance. "Very well," said the judge, "the Court will adjourn without Sarah Money." Everybody laughed except one man, who sat silent for two minutes and then burst into a loud guffaw, when nearly everybody else had already left the Court-room. On going home, the man told the story to his wife, but he stupidly changed the "Sarah" into "Mary." "The Court will adjourn without Mary Money. I don't see anything funny in that," said the wife. "I know you don't," replied the man. "You don't see anything funny at first, but if you wait for about two minutes you will."

To the general good-nature of Mr. Robinson's reminiscences there is an exception in the case of the late Mr. Sergeant Ballantine, whom he evidently disliked. That celebrated pleader he represents as impulsive and inconsistent, lacking in principle and stamina, and with a cynical contempt for all social conventions and decencies. Quite as remarkable as Ballantine's was the career of Sergeant Wilkins, who, disgusted by the severity of his father, who brought him up upon a cane quite innocent of sugar, ran away from home, and "for a lengthened period subsisted on sixpence a day by playing in the cornfields the part of a scarecrow." By and by we find him a schoolmaster, next a newspaper editor, and finally a barrister with rapidly rising success. But success was too much for him; he launched out into absurd extravagance, went to pieces, and died "worse than poor."

The following is told of a barrister who would talk, talk, and was not to be put down. He had mentioned many points in his case, and "at length he mentioned one which Sir George Jessel said he would at once refuse to hear discussed—it ought to have been taken in the Court below. 'But, my Lord, I did take it in the Court below, and the judge stopped me.' The chief revived. He looked forward over his desk, and said earnestly to his persecutor, 'Do you really mean to say, sir, that he stopped you?' 'Yes, my Lord, he really stopped me.' 'Did he?' said the chief; 'you would much oblige me by telling how he did it; the process may be useful to me in future.'"

Mr. Robinson is no stylist, and as a literary effort the work

before us does not rank high. There is, too, a tendency to garrulity and to small beer, which are almost inevitable in the reminiscences of an octogenarian. Moreover, some of the disquisitions, such as that upon Socialism, are quite out of keeping with the general character of the work. But the geniality and cheerfulness which dominate the whole go far to atone for the defects of the volume ; and though it will not live, it is worth perusal for the hour.

Perhaps the most amusing part of the work are the two chapters devoted to Sir William Maule and Samuel Warren. Maule was a brilliant wit, and several specimens are given, of which the following is perhaps one of the best :—

“ A witness, who had given his evidence in such a way as satisfied everybody in Court that he was committing perjury, being cautioned by the judge, said at last, ‘ My Lord, you may believe me or not, but I have not stated a word that is false, for I have been wedded to truth from my infancy.’ ‘ Yes, sir,’ said Maule, ‘ but the question is, how long have you been a widower ? ’ ”

On another occasion Maule said to a mumbling witness : “ Witness, for the sake of God and your expenses, do speak out.”

Warren, according to Mr. Robinson, was the most complacent of snobs, and his elastic temperament was proof against all attempts at suppression by the most studied rebuff.

“ He was always boasting of his intimacy with the members of the peerage, and one day he was saying, that while dining lately at the Duke of Leeds’, he was surprised at finding that no fish of any kind was served. ‘ That is easily accounted for,’ said Thesiger, ‘ they had probably eaten it all upstairs.’ ”

Follett, according to Mr. Robinson, was for sheer intellectual force the most powerful advocate of the century,—a judgment which, if true, shows how disproportionate the reputation a man leaves behind him often is to his real capacity. A story is told of Follett and Maule.

“ There was a very important and intricate case coming on in the House of Lords, and the Peers had summoned the judges to attend there to hear the subject-matter argued by counsel, and to give their opinions upon it. Follett was retained as

counsel on one side, and Maule on the other. Shortly before the case came on, Follett strolled into the kitchen of the House of Commons (to which the Bar had always access in the daytime), and called for a biscuit and a glass of sherry. To his surprise he saw Maule sitting at a table with a rump steak and a huge flagon of stout before him, to the consumption of both of which he was applying himself with the most exemplary assiduity. Follett could not help expressing to his opponent his surprise at seeing him indulge in so solid and carnal a diet by way of preparation for the task he was about to enter upon, and for which a clear, unclouded brain was essential. 'As to clearness of brain,' said Maule, 'I find that mine is too clear already. The truth is, I am striving to bring my intellect down to a level with the capacity of these idiotic judges.' "

One is reminded of a story of the late Mr. Nevay, who, when the head of the Court remarked, "Well, Mr. Nevay, all I can say is, that if that be the true meaning of this document, I don't understand the use of the English language," brushed the interruption aside with an airy wave of his hand, "Be it so, my Lord," and continued his argument with imperturbable assurance.

The Green Bag continues to fulfil the promise of its first numbers, and is undoubtedly one of the most readable and entertaining journals which crosses the Atlantic. Not the least pleasing feature of the publication is the brevity of all its articles. They never weary the reader by diffuseness, and are always full of healthy interest and spirit.

English Decisions.

MAY—JUNE.

(All current English Decisions likely to throw light upon any point of Scottish law or practice are here reported.)

INSURANCE.—*Accidental death—Poison—Construction of policy.*—*A. was insured against death by "accidental, external, and visible*

means," under a policy which was not to "extend to death by suicide, whether felonious or otherwise, . . . or to any death or injury caused by duelling or fighting, or any other breach of the law on the part of the insured, or by poison or intentional self-injury." A., by accident, drank some poison in mistake for medicine, and died from the effects. It was contended on behalf of his representatives that the death was the result of an accident caused by outward and visible means, and that as the poison had been taken by misadventure, the proviso disentitling the insured to recover in the case of death by poison did not apply, as from the context it was clearly intended to apply to the intentional taking of poison. *Held*, that the accident came within the proviso, and that the deceased's representatives had no claim under the policy.—*Cole v. Accident Insurance Company*, Q. B. Div. (Mathew and Grantham, J. J.), 10 May 1889.

COMPANY.—*Voluntary winding-up—Sale—Sanction of Court*.—A company was in the course of voluntary winding-up, and duly passed a special resolution under sect. 161 of the Companies Act, 1862, for the sale of its assets to a new company, in consideration of the issue of shares in the new company to the shareholders of the old company. The voluntary liquidator applied for the sanction of the Court to the resolution, in accordance with the proviso at the end of sect. 161 of the Companies Act, 1862, so that it might not be invalidated in case a winding-up order by the Court should be made within one year of the passing of the resolution. *Held*, that the proviso at the end of sect. 161 referred to sanction by the branch of the Court having control over winding-up proceedings after such proceedings had been ordered, and that the Court could not give the sanction wished for before an order had been made for winding-up by or under the supervision of the Court.—*Re Calloa Bis. Co. Lim.*, Ch. Div. (North, J.), 10 May 1889.

COUNTY COUNCIL.—*Woman Councillor—Knowledge by electors of disqualification*.—*Held*, that a woman is not eligible to be elected as a County Councillor, and that as the electors knew that the candidate was a woman, the votes given for her were thrown away, and that the candidate having next most votes was therefore duly elected.—*Beresford-Hope v. Sandhurst*, Ct. of App., 16 May 1889.

COMPANY.—*Bills—Incorrect title of company—Liability of directors*.—By sect. 41 of the Companies Act it is provided, that "every limited company under this Act shall have its name mentioned in legible characters on all notices, advertisements, and other official publications of such company, and on all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods, purporting to be signed by or on behalf of such company." Sect. 42 of the same Act provides, that "if any director, manager, or officer of such company, or any person on its behalf, . . . issues or authorizes the issue of any notice, advertisement, or other official

publication of such company, or signs or authorizes to be signed on behalf of such company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods, . . . wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of £50, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company." A., a creditor of the "South Shields Salt Water Baths Company Limited," drew a bill of exchange for £125 upon the "Salt Water Baths Company Limited, South Shields." The chairman and two directors accepted the bill on behalf of the company. It appeared subsequently that the company had no power to accept bills of exchange. A. brought an action to recover the sum due on the bills from the chairman and directors, and it was contended on his behalf that the defendants had by signing a bill on behalf of the company, on which the name of the company was not correctly mentioned, rendered themselves personally liable to the holder of the bill for the amount thereof. *Held*, that the variation from the proper designation of the company was sufficient to render the defendants personally liable under sect. 42 of the Companies Act, 1862.—*Atkin v. Wardle*, Q. B. Div. (Denman, J.), 18 May 1889.

SETTLEMENT.—Construction—Survivor—Failure of issue—Issue of predecessor—Accrued share.—A testatrix left £8000 equally between her four nieces in liferent and their respective issue in fee. She directed that in case of the failure of any of the four without issue, her share was to go "among her surviving sisters and their respective children, in the same manner as I have hereinbefore directed respecting their original share." The first liferenter to die left issue. The two next died without issue. One still survived. On the death of the second her share was divided into three parts, and one part was paid to the children of the niece who died first. This case arose in the administration of the estate of the third. *Held*, that when the gift is to A., B., and C. equally for their respective lives, and after the death of any to her children, but if any die without children, to the survivors for life, with remainder to the children, only children of survivors can take under the gift over; but *held*, further, that the children of the predecessor participate when the limitations are to A., B., and C. equally for their respective lives, and after the death of any to her children, and if any die without children, to the surviving tenants for life, and their respective children, *in the same manner as their original shares*. *Held*, therefore, that the division of the shares which had been made of the first niece, who died without issue, must stand; and the original share of the second niece, who died without issue, must be divided on the same principle, that is, one-half to the children of the first niece, who died, and *one-half* to the surviving niece; but that the accrued share fell into residue.—*Re Bowman*, Ch. Div. (Kay, J.), 18 May 1889.

CRUELTY TO ANIMALS.—*Dishorning cattle.*—*Held*, that the dishorning of cattle is a cruel, unreasonable, and unnecessary abuse of the animal, and that therefore it is illegal and ought to be repressed.—*Ford v. Wiley*, Q. B. Div. (Coleridge, C. J., and Hawkins, J.), 18 May 1889.

BILLS.—*Bills of Exchange Act, 1882, sect. 7, sub-sect. 3—Forgery—Fictitious payees—Negligence.*—Section 7, sub-section 3 of the Bills of Exchange Act of 1882 provides, that when the payee is a "fictitious or non-existent person, the bill may be treated as payable to bearer." A forger had inserted on a bill as payee the name of an existing person, who, however, had nothing to do with the bill. *Held*, that this payee was not a "fictitious or non-existing person" within the meaning of the section. Circumstances in which *held*, that an employer had not been guilty of such negligence as disentitled him to recover from a bank sums with which his account had been debited owing to forgeries by his clerk.—*Vagliano Brothers v. Bank of England*, Ct. of App., 21 May 1889.

TRADE NAME.—*Use of similar name—Fraud—Injunction.*—Plaintiff's (a limited) company, with registered name "Thomas Turton & Sons (Limited)," had purchased and carried on an old-established business of steel manufacturers in Sheffield, which had for many years been carried on under the name of "Thomas Turton & Sons." Defendant, who was named John Turton, had for many years carried on a similar business in Sheffield under the firm of "John Turton & Co." In 1888 he took his sons into partnership, and adopted as the name of the firm, "John Turton & Sons." The plaintiff's company raised this action to restrain defendant from using that name, or any other form or style so closely resembling plaintiff's name as to be calculated to deceive. Defendant urged that he had acted in *bona fide*, and that the name was the natural and accurate description of the firm. *Held (rev. North, J., ante., p. 222)*, that in the absence of any fraud or misrepresentations on the part of the defendants, they were entitled to call themselves "John Turton & Sons," which was an accurate and strictly true description of the firm.—*Turton v. Turton*, Ct. of App., 22 May 1889.

SETTLEMENT.—*Appointment—Fraud upon the power.*—A. settled his life policy and all bonuses on trust, after his death, for his three children as he should appoint, and in default equally. He appointed by deed to X. one of his children, who surrendered the policy, and handed the greater part of the proceeds to A., for his own benefit. A. died. The appointment being set aside as a fraud upon the power, *held*, that the amount for which A.'s estate was liable to the objects of the power was not merely what he had received, but the amount which would have been received on his death, if the policy had been kept up; but that X., as having been a party to the fraud, was not entitled to any of the money repayable by the estate of A.—*Bridger v. Deane*, Ct. of App., 23 May 1889.

HABEAS CORPUS.—*Disobedience to the writ—Child—Custody.*—The defendant, a philanthropic gentleman, received a child into his custody, on an agreement by her mother giving him authority to send the child to any place of employment in the United Kingdom or any of Her Majesty's colonies. The mother's solicitors, however, wrote asking the child back, and the defendant immediately handed the child over to a lady, who took her with her travelling on the Continent, and intended taking her to Canada. A writ was issued against the defendant, commanding him to bring up the body of the child. He pled an *affidavit* that the child was not in his control, she was beyond the seas, and he did not know where. On a motion for attachment, it was contended for the prosecutor, that the defendant had been guilty of contempt, in having put it out of his power to obey the order of Court, with the intention of evading the process of the Court. *Held*, that the defendant had been guilty of disobedience to the writ of *habeas corpus*.—*Reg. v. Barnardo*, Q. B. Div. (Mathew and Grantham, J. J.), 23 May 1889.

SHIP.—*Maritime lien—Necessaries.*—A master has no maritime lien on the ship for disbursements in respect of necessaries for the ship, either under the Merchant Shipping Act, 1854, sect. 191, or under the Admiralty Court Act, 1861, sect. 10.—*Hamilton v. Baker*, House of Lords, 27 May 1889.

JURISDICTION.—*Foreign corporation—Scottish company carrying on business in England.*—Section 62 of the Companies Act enacts, that "any summons . . . required to be served upon the company may be served by leaving the same, or sending it through the post, in a registered letter addressed to the company at their registered office." Order IX., v. 8, provides, that "where by any statute provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, . . . every writ of summons may be served in the manner so provided." Order XL, v. 1, provides, that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. "This was an appeal from an order of a judge at chambers, that the service of a writ of summons on the defendants should be set aside on the ground that the defendants were a Scottish corporation, having their registered office in Scotland, and so were out of the jurisdiction." The action was on a life policy made with the defendants, or alternatively for damages for refusing to grant a policy. The defendants had a large branch establishment in the city of London, and the cause of action arose within the jurisdiction. The plaintiff contended that the defendants were a foreign corporation, but, as they carried on business within the jurisdiction, they could be rightly served in

England, the cause of action having arisen in that country. *Held*, that the appeal ought to be dismissed, and that a Scottish corporation having its registered office in Scotland, though carrying on business in England, cannot be served within the jurisdiction.—*Watkins v. Scottish Imperial Insurance Company*, Q. B. Div. (Mathew and Grantham, J. J.), 27 May 1889.

PRINCIPAL AND AGENT.—*Profit on transaction—Concealment of buyer's name—Del credere commission.*—In 1879, the plaintiffs, timber merchants, purchased through the defendants, timber brokers, Baltic timber to the value of about £70,000. They placed it in the hands of the defendants for sale on a *del credere* commission of 3 per cent. They received from the defendants £2000 as the net profit on the whole transaction. The plaintiffs had sold the timber to M., a large debtor of their own, and they sold it again for him at a profit of £15,000, which went to diminish his debt to them. The defendants did not disclose to the plaintiffs that M., the purchaser, was a debtor of their own. *Held*, that the defendants had acted honestly throughout these transactions, and in good faith, and had given the plaintiffs the best advice in their power; that the Court would not draw the inference of fact that M.'s indebtedness to the defendants induced them to give false or misleading advice to the plaintiffs; and that an interest in M., as their debtor, did not render the defendants accountable to the plaintiffs, or bound to disclose the fact to them.—*Guy v. Churchill & Sim*, Ct. of App., 28 May 1889.

SHIP.—*Charter-party—Master's disbursements—Coal.*—The charterers of a ship were liable for disbursements other than "port charges, pilotages, or other expenses," incurred owing to the vessel having to put into any port owing to a breakdown. *Held*, that extra coals, necessary owing to a deviation caused by a breakdown, were not included within the words "port charges, pilotages, or other expenses," and that therefore the charterers were liable for them.—*The Durham City*, Adm. Div. (Butt, J.), 28 May 1889.

SHIP.—*Collision—Steamer and sailing vessel—Regulations for preventing collisions at sea.*—By Art. 17 of the Regulations it is provided: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." *Held*, that this did not apply to a steamer which had only sufficient way on to keep herself under command, and which she showed by carrying the lights prescribed by the regulations for this condition; and that she was not bound to keep out of the way of the sailing vessel.—*The Tweedsdale Admiralty Div.* (Butt, J.), 1 June 1889.

SETTLEMENT.—*Appointment—Reservation of power to revoke.*—Where parents have a joint power of appointment, and failing such joint appointment, the fund is to go to one of the parents, it is not legitimate to reserve a power of revocation to the parent having

the reversion in a joint deed of appointment.—*Burnaby v. Buillie*, Ch. Div. (North, J.), 3 June 1889.

MINE.—*Coal mines—Regulation Act, 1872—Payment by weight—Deductions.*—*Held*, that the deduction of the weight of slack passing through a sieve, in calculating the wages due to coal miners paid by weight, is illegal.—*Netherseal Colliery Co. v. Bourne*, House of Lords, 3 June 1889.

COMPANY.—*Transfer of shares—Refusal to register—Subsequent calls—Resolution to make call without fixing date.*—A transfer of shares was reported to a board of directors, who deferred consideration of it until they had disposed of their other business. In the course of this business they made a call, but fixed no date for payment. Thereafter, they refused to register the transfer, on the ground that a debt was due to the company upon the shares. *Held* (reversing Chitty, J., *ante*, p. 276), that when the transfer was delivered for registration to the secretary, who was the person fixed by the Articles to receive it, no debt was due; and therefore the directors had no discretion in the matter, and were bound to register it. *Held*, also, that no date being fixed for the payment of the call in the resolution, no call was in fact made.—*Re Cawley & Company Limited*, Ct. of App., 3 June 1889.

SETTLEMENT.—*Codicil—Destruction—Animo revocandi.*—A testatrix executed a codicil to her will on 21st March. This was duly attested. On the same day this document was torn up by two grand-nieces of the testatrix in her presence and by her directions, she being under the mistaken impression that, in consequence of her having made a clerical error when filling in the date at the end, the whole document was nugatory. On the same day the four pieces into which the document had been torn, were forwarded by the testatrix, or by her direction, to her solicitor, with instructions to have a fresh copy of the same made and forwarded to the testatrix as soon as possible. This was done on the following day, but the codicil was not executed owing to the illness of the testatrix, who died on the 11th April. *Held*, that the codicil was not destroyed *animo revocandi*, and that it was entitled to probate along with the will and other codicils of the testatrix.—*Thornton*, P. & D. Div. (Butt, J.), 4 June 1889.

REPARATION.—*Canal—Minerals—Support.*—By a private Act giving power to make a canal, it was provided that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal; and that it should be lawful for such owners to work such mines, not thereby injuring, prejudicing, or obstructing the canal; and further, that if the owner or worker of any coal pit or mine should in pursuing such mine work near or under the canal, so as in the opinion of the canal company to endanger or damage

the same, or in the opinion of the owner or worker of the mine to endanger or damage the further working thereof, then it should be lawful for the company to treat and agree with the owner or worker; and in case of disagreement, an owner was to be summoned to assess the amount such owner or worker ought to receive on being restrained from working such mine; and on payment of the amount assessed by the jury, such owner or worker was to be perpetually restrained from working such mine within the limits for which satisfaction should be declared by the jury to extend. The appellants, the coal owners, gave notice to the respondent company, in whom the canal had become vested, of their intention to work coal forming the support of the canal; and the respondents declined to purchase the coal or to pay compensation to the appellants for leaving it. The respondents therefore worked the coal, and damaged the canal. *Held*, that they had a right under the Act to require a jury to be summoned to assess the compensation, but had no right to work the coal to the injury of the canal, and were liable for the damage so caused.—*Knowles v. Lancashire and Yorkshire Railway Company*, House of Lords, 4 June 1889.

SETTLEMENT.—*Construction*—“*To be settled*”—*Executory trust*.—*Held*, that a direction that a certain fund is “to be settled” in a certain way, creates an executory trust, in carrying out which the Court will modify inapt provisions.—*Bullance v. Lamphier*, Ch. Div. (Kay, J.), 4 June 1889.

COMPANY.—*Liquidation*—*Priority*—*Claim against company after commencement of winding-up*.—*Held*, that creditors who have begun diligence after the commencement of winding-up, but before the supervision order, are not entitled to priority over the other creditors of the company.—*Re The Thurso New Gas Company Limited*, Ch. Div. (Kay, J.), 5 June 1889.

DESIGN.—*Registration*—*Similar design in different material*.—A design in all respects similar to one already registered, but for an article to be made of a different material, is not entitled to registration under the Patents, Designs, and Trade Marks Act, 1883.—*Re The Design of W. F. Bach*, Ch. Div. (Kekewich, J.), 5 June 1889.

COMPANY.—*Liquidation*—*Sale of assets*—*Sanction of Court*.—*Held* (affirming North J., *ante*, p. 381), that the proviso of sect. 161 of the Companies Act, 1862, which authorizes the Court to sanction a sale of assets to a new company, refers to sanction by the branch of the Court having control over winding-up proceedings after such proceedings have been ordered, and that the Court cannot give such sanction before an order has been made for winding-up by or under the supervision of the Court.—*Re Calloa Bis. Company Limited*, Ct. of App., 7 June 1889.

SETTLEMENT.—*Construction*—*Legacy to wife*—*Priority*.—A testator bequeathed to his wife all his jewels, plate, horses, household

furniture, etc., and also "the sum of £1000 to be paid to her immediately after my death for her immediate requirements." The testator then bequeathed certain small annuities, and gave other legacies to the amount of £180,000. The estate proved insufficient, after satisfying debts, to pay all the annuities and legacies in full. *Held* (following *Blower v. Morret*, 2 Ves., sect. 420, and dissenting from *Wills v. Borwick*, 17 Ch. Div. 798), that the legacy to the widow was liable to abatement as well as the others.—*Cazenove v. Cazenove*, Ch. Div. (Kekewich, J.), 7 June 1889.

RESTITUTION OF CONJUGAL RIGHTS. — *Adherence* — *Pre-marital incontinency*.—*Held*, that an allegation of pre-marital incontinency on the part of a wife, and pregnancy following thereon at the date of marriage, is not a relevant answer to an action for restitution of conjugal rights.—*Mason v. Mason*, P. and D. Div. (Butt, J.), 7 June 1889.

DIVORCE.—*Intervention by alleged adulterer*.—*Held*, that an alleged adulterer was entitled to intervene in a divorce action and defend himself against the charge, although he was not made a co-respondent in the suit, and could not therefore be made liable either in damages or costs.—*Wheeler v. Wheeler*, P. and D. Div. (Butt, J.), 19 June 1889.

Sheriff Court Reports.

SHERIFF SUMMARY COURT, DUNDEE.

Sheriff CAMPBELL SMITH.

Public meeting—Street—Magistrates—Statute 1606, cap. 17—Proclamation.—The magistrates of a burgh have power, both at common law and under the statute 1606, cap. 17, to prohibit meetings on the public streets, when they are satisfied that such meetings are likely to cause obstruction of the highway, or uproar and disorder.

Breach of the peace.—Every act of rebellion against constituted authority is a breach of the peace.

Sunday Street Meetings Nuisance.—Opinion that street meetings on Sunday may be suppressed by interdict as a public nuisance.

The magistrates of Dundee, acting upon reports of disorderly proceedings at Sunday meetings forwarded them by the Chief Constable, issued a proclamation prohibiting meetings in certain public streets upon Sunday.

In defiance of this proclamation, a meeting, called by extensive public advertisement, was held in one of the proclaimed streets upon a Sunday. An immense concourse of people, many of them attracted by curiosity, assembled. There was a good deal of noise

and shouting, and some swearing, and some of the policemen were kicked whilst forcing their way through the crowd with a ringleader whom they had apprehended. But the crowd was on the whole a good-humoured one, and the ringleaders exerted their influence to restrain their followers from any acts of violence or overt disorder.

Three prisoners—Robertson, Hutchison, and Connor—were tried for the offence, the first two being ringleaders, the last a member of the crowd who had become unruly. The charge against the prisoners was of “the crime of breach of the public peace, and also of the offence of breaking the terms of a proclamation made and published by the magistrates of the burgh of Dundee on the 16th day of March 1889, by virtue of the powers conferred on them by the Act of Parliament passed in the reign of James VI., in the year 1606, cap. 17, and other powers possessed by them as magistrates of, and responsible for, the peace of the said burgh, in so far as on Sunday, 24th day of March 1889, the said James Robertson, Robert Hutchison, and James Connor did, in Euclid Crescent, in the said burgh, by violent and disorderly speeches, incite and cause the assemblage in Reform Street and High Street of the said burgh, on the date last mentioned, of a large, tumultuous, and disorderly crowd of people, whereby the lieges were annoyed and alarmed, a great noise and disturbance was caused, and a breach of the public peace committed; and the said James Robertson, Robert Hutchison, and James Connor, and said crowd, did then and there disobey, defy, and set at naught the said proclamation.”

Objection was taken to the complaint, on the grounds, *inter alia*, that the statute libelled was in desuetude, and that no relevant charge of breach of the peace had been set forth. The Sheriff repelled the objections, reserving his exposition of the law until he had heard the evidence. After evidence had been led, the Sheriff convicted all three prisoners; but in consideration of the novelty of the case, and of certain mitigating circumstances, he did not sentence them to more than small fines and caution for good behaviour. In the course of his judgment the Sheriff said:—

“After hearing the evidence, and having considered it with every disposition to give you prisoners the benefit of any reasonable doubt I could possibly entertain, I have come to the conclusion that I cannot acquit any of you of breaking the law in Dundee on Sunday, the 24th of March. As two of you are men of intelligence, though on that particular Sunday you did not act as if you were, I will explain what I am to convict you of, and why I am to do it. You are accused of two offences—the common law offence of breach of the peace, and another offence, depending partly upon the old statute of 1606, cap. 17, and partly upon the use and wont powers of magistrates, the offence of wilfully disobeying an order of the magistrates of Dundee forbidding the holding of public meetings at certain places on Sundays. From what one of you has all along stated and otherwise, I believe it was your intention, and

that of your friends and followers, to defy the magistrates' order or 'proclamation,' but not, in so far as it could be avoided, to break the public peace, and that it was your intention merely to break the law forbidding public meeting, because you thought it bad law, and because you wished to have it tested by the Courts of law whether this law as proclaimed was good or bad, whether it was *ultra vires* or *intra vires* of the magistrates. I recognise your right to challenge the law as enunciated by any magistrate, and to submit it in some competent form to any competent Court of review. That is a right possessed by every citizen of this community, however poor and humble he may be; but I must say that your mode of procedure in setting about testing the magisterial law is of a most unenlightened kind, and hardly worthy of the members of a civilised community. A civilised man does not put his hand into boiling water to ascertain whether it will burn, neither does he take to picking pockets or breaking heads in order to ascertain if these amusements are forbidden by law. There are some professional gentlemen who have devoted their lives to the study of law, and who are generally supposed to have some knowledge of it, but most men of ordinary intelligence know that very little law is settled in criminal cases, and that all a criminal, as a rule, has a chance of learning is just as much law as will open the prison doors for him, either by way of entry or exit. The law of the public streets is well settled, but it has been settled for the most part by the civil Courts, for the attention of criminal Courts has been confined chiefly, not to those who use the streets, but to those who seek to pervert them from their proper use, and to infringe the equal rights and interests of others. However, I do not blame you very much for your ignorant, foolish plan of breaking the law in order to test it. You are merely following the absurd example of others who are aliens to the common-sense and common intelligence of Scotland, and who cannot apprehend an abstract idea until a policeman's baton has brought it into close relation with the outside of their skulls, who are irrational enough to fancy that they are advancing the cause of liberty, when they are destroying, or at least assailing, the sole and essential safeguard of liberty, which is law. I do not know that it is my duty to give an exposition of law beyond what this case requires; but as I would rather keep respectable men, even though wild enthusiasts, out of prison and out of trouble than tempt them into it, I shall prefer to err rather on the side of frankness than of reticence. The streets of the town are the property, not of the magistrates alone, but of the whole inhabitants of the town, and they are dedicated to the ordinary and well-known uses of roads or of streets. They are dedicated to be thoroughfares for men, for animals, and for carriages, and not dedicated to be arenas for orations, or for manifestations of mob force and its powers of intimidation and destruction, or for rioting. No one, on the pretence of enlightening or converting the public, has a right to obstruct the street. He is bound to walk on and keep his feet in

motion, however his tongue may be occupied ; and any one who collects a crowd—whether he be a cursing fishmonger, or a frantic politician, or a demented Salvationist—is a breaker of the law, because he is not merely using his own right in the streets, but usurping the rights of others, obstructing their right-of-way, and annoying them by excited, loud, incoherent raving, or at least by noise they do not wish to hear. No men, whatever their calling or station, have any right of public meeting on the streets. The magistrates themselves have no such right. They are trustees for the public, and their power over the streets is simply to regulate the use of the streets for the benefit of the whole public, not to convert them or any part of them into arenas for public meeting, which would not be a regulation of the use of public thoroughfares, but a perversion to an entirely different and perhaps mischievous purpose, and an obstruction of public rights-of-way. In my opinion, a magistrate would have no more right to denounce socialism to a crowd on the High Street, than a socialist would have a right to denounce the magistrates in the same place on Sundays or on Saturdays, and I incline to the conviction that the mouth of any Sunday street orator can be closed, if not by the police, then by interdict as a public nuisance. If there be one personal right belonging to every inhabitant of Scotland, to every citizen of Dundee, more than another, it is his right to spend his Sunday in peace, to say his prayers in public or in solitude, to meditate in silence upon the lights and shadows of existence, to think his own thoughts without distraction, whether they be profane or pious. But how could any one not deaf, in the vicinity of High Street, Dundee, think his own thoughts and enjoy his Sabbath peace with one set of fanatics yelling about the miseries of the poor and the vices and oppression of the rich ; another set singing hymns to various different tunes, some with sacred and many with secular associations ; a few units in ecstasies of hope shouting ‘Hallelujah ;’ and a greater number in paroxysms of despair practising the exercises of howling and groaning by way of preparation for a miserable hereafter ? Because a man is a fanatic inspired by ignorant or unprincipled socialism, or not less ignorant, unreasoning superstition, what right has he to fob the peaceable, rational, home-keeping inhabitants of a district of their Sabbath peace, and force upon them a medley of wild, unhappy noises, as if Bedlam had let loose its most discontented, strong-lunged, weak-minded inhabitants ? Is it not rather strange and somewhat unaccountable that politicians who pretend to seek after equal rights for themselves, should show the kind of sincerity that is in them by disregarding and trampling upon the rights of others, and by insulting the religious feelings and convictions of all who are compelled to listen to the political rant with which you and the like of you desecrate the Sabbath day ? I do not say that your mouths should be shut, but I do say that nobody should be compelled to hear you. Liberty of speech is the right of all, but so also is the liberty of refusing to hear.

You object to having silence, which is golden, forced upon you; but you think yourselves entitled to force upon others your oratory, which at best is silvern, which may be only brazen, and which may at times be only street-sweepings and mud not entirely deodorized. You have not yet learned to try to do as you would be done by; and until you have learned that golden rule, and some others that are not usually shouted on the streets on Sundays, your socialism will be a delusion, or a hypocrisy not fit to be believed in or practised by an honourable gang of robbers. What your principles may be I don't know. If they be like your practices, they must have been invented with very little assistance both from reason and from conscience. I am satisfied you did commit a breach of the peace in collecting this crowd. The crowd was an instrument for breach of the peace, and invited for that purpose. The man who collects such a crowd runs a risk of being held responsible for all it does. Besides, there was a noisy disturbance, and tumult and disorderly cries of such a kind as to give it the character of an instrument for a breach of the peace. I have hesitated very much because of the allegation in it of breach of the peace partly by proxy. I find the complaint clearly proved in so far as wilful and intentional breach of the order or proclamation of the magistrates of Dundee is concerned; and as that finding, in my view of the law, includes a breach of the peace, I could not possibly acquit of breach of the peace. I know that it is difficult, if not impossible, to find a precise and exhaustive definition of breach of the peace. In the instances of it most familiar to us there is a good deal of noise and cursing, and consequent alarm and annoyance to peaceable people, and in this Sunday crowd there was more than enough of this noisy element. But it seems to me that the term 'peace' is the antithesis to the term war, and that every act of rebellion against constituted authority is a breach of the peace, whether that act be done by a noisy street rowdy, or a quiet shebeen-keeper, or a secret collector of arms for the use of the enemies of the country, whether internal or external, and that the peace was broken when the magistrates' order was broken, as also by the tumultuous crowd on High Street, and what was done by it."

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THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.



Editorial.

The Summer Session.—The Court of Session rose on 20th July for the summer vacation. The session just ended has been a busy one, and a large amount of work has already accumulated which will have to be overtaken during the coming winter session. This state of things cannot be regarded as other than satisfactory. In itself, litigation is no doubt an evil. As a symptom, however, it is excellent. The causes which bring about lawsuits are various, and range from short tempers and calling names, to thunderstorms and Acts of Parliament. In so far as litigation merely gives evidence of the existence or occurrence of these things, its testimony is of doubtful value. But in so far as it indicates reviving prosperity—the fact of money to spare for the expensive luxury of going to law—it is a welcome sign.

* * *

H.M. Advocate v. Mansons.—Early in the past month a father and daughter hailing from Shetland were sentenced in the High Court to fifteen and five years' penal servitude, respectively, for the crime of incest. The case was tried with closed doors; a precaution universally admitted to be necessary in cases of this description, by way of checking the prurient curiosity of the vulgar—as necessary as the observ-

ance of a judicious reticence on the part of the press in reporting their details. But the price of dispensing with publicity is the loss of that guarantee for the fairness of the trial which the liability to unrestricted public criticism supplies. In the present instance it is, no doubt, impossible to express the opinion that the verdict was not according to the evidence. It was certainly in accordance with the view of the evidence taken by the Lord Justice-Clerk, who presided, for his charge was so explicit as to be entirely devoid of the kind of judicial equilibrium for which one looks in such deliverances, and which gives them their peculiar non-committal character. But incest is not readily capable of proof, and it is certain that the judge's summing-up and the verdict of the jury in the present case astonished most of those who availed themselves of their professional privilege of being present at the trial. Incest can, except in rare instances, be only circumstantially inferred, and the inference ought imperatively to be of the clearest. There is a risk lest the natural horror excited by the mere suggestion of so rank an offence, should insinuate a criminal construction of facts which are *primâ facie* consistent with innocence. It is a risk which the most generous natures are most exposed to; but a judge should be proof against it. The Lord Justice-Clerk is an authority on criminal law, and has minute familiarity with criminal procedure, but he seemed to those who were present at the trial in question to be familiar neither with the rules of evidence nor with their application. The unfortunate prisoners were guilty—so the jury have found, but whether the strict law was satisfied in respect of the character of the proof is another question.

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Pious Plagium.—By a singular coincidence the Supreme Courts of Scotland and of England have simultaneously been engaged in disposing of a question which, so far as we are aware, has not before arisen in either country. In both cases a charitable person having been entrusted by a parent with the care of a child, allowed another charitable person to remove the child out of the jurisdiction after the parent had demanded it back. In both cases charitable person No. 2

has refused to bring the child back, or to disclose where it is. In both cases the Court, whilst expressing full appreciation of the benevolent aims of charitable person No. 1, has held that he is responsible for the child, and that he is bound to take the necessary steps to recover the child and to have it restored to its parent. The Scottish case is *Delaney v. Colston* (7th June 1889, 26 S. L. R. 576). In this case the Directors of a home for destitute children allowed a lady to remove two children to Canada. The father having demanded them back, Miss Stirling was induced to bring them to this country. But after they had been brought back, the Directors took no steps to recover them from Miss Stirling, and she took them back to Canada. Thereafter she refused to bring them back or to disclose their whereabouts. The Court of Session held the Directors responsible, and pronounced the following order—"Ordain the respondents to deliver to the petitioner his children on or before the first sederunt day in October next; and, further, ordain the respondents to report to the Court on Thursday, the 18th July, what steps have been taken in pursuance of this order." Upon 18th July counsel for the respondents stated that his clients had sent their secretary to Canada to recover the children; that he had cabled that Miss Stirling refused to give them up; and that he was now applying to the Canadian Courts for their recovery. So the matter stands for the present.

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The English case is that of *The Queen v. Barnardo* (Court of Appeal, 16th July 1889). Dr. Barnardo was entrusted by the mother with the care of a child, with power to send it to Canada. Whilst the child was still in this country the mother applied to have it back. Dr. Barnardo, instead of restoring it, handed it over to a lady who removed it out of the jurisdiction. It appeared that he was under the belief, on erroneous information, that the mother was leading an immoral life. A Writ of Habeas Corpus was issued by the mother against him. He argued that he was not guilty of disobedience to the Writ in not bringing up the child, as the Writ was not issued until after he had parted with the child; and the person to whom he had entrusted it now refused to bring

it back, or to disclose its whereabouts. The Divisional Court held it to be proved that he sent away the child in order to evade a Writ, which he foresaw would be issued, and that therefore he was guilty of contempt. The Court of Appeal did not think this ground of judgment borne out by the evidence, but they equally held him responsible, and that on the ground that the sending of the child out of the jurisdiction after the mother had asked it back was an unlawful act. An attachment is therefore issued against him. He is not to be imprisoned in the meantime, but he is to answer certain interrogations, and he is found to be responsible to take all the necessary steps to have the child brought back.



The Plea of Kleptomania.—At the Sheriff Criminal Court in Glasgow the other day, a prisoner named Fraser was accused of stealing a handbag from a shop door. He pled guilty to the charge; but it was stated on his behalf that he suffered from a sort of intermittent kleptomania. About a year ago Fraser's wife died, and since then he had been pretty constantly addicted to drink. Whenever he came under this influence, "he seemed to be troubled with kleptomania," and the insane propensity manifested itself in his appropriating articles hung out at shop doors for sale. Within the previous six months the prisoner had been convicted of this form of theft no fewer than three times. Before his wife died, however,—that is, before he took to excessive drinking,—he had been convicted of theft; an awkward element in his defence, only if drunkenness were alleged to be the sole cause and origin of his monomania. The learned Sheriff did not believe in the kleptomania explanation. "To call it kleptomania," he said, "is simply nonsense;" and Fraser was accordingly sentenced to nine months' imprisonment. Without questioning in any degree the justness of his conclusion (which we are certainly not disposed to do), we may remark on one of the Sheriff's grounds for reaching it, as stated in the brief reports furnished by the daily newspapers. So far from the frequent recurrence of thefts by a prisoner being a circumstance telling against the plea of kleptomania, the effect of that, so far as it goes, is entirely in the other direction. We

are strongly of opinion that amongst the class of habit and repute thieves this form of insanity is very rife indeed; and the fact that the defence of kleptomania is almost never advanced in such a case, can be due only to the extreme difficulty of substantiating the plea on behalf of a person so miserably circumstanced, and in whom a strong motive for theft can so readily be imagined. At best, the question would be a delicate one as regards proof. But that does not affect the fact. Only, it would seem, where the worldly position of the accused is of a kind to remove all supposition of the motive for theft, is the presence of kleptomania ever suspected. Yet there is nothing peculiar in the habits and surroundings of the more comfortable classes to predispose them to this form of moral mania more strongly than their less fortunate fellow-citizens. Among the latter, insanity in general is to be found in at least as high proportion as among the former; and the other forms of *monomanie sans délire*, such as homicidal mania, pyromania, and erotomania, are recognised without discrimination of class in the sufferer. Were the mental state, as a whole, of many a "common" thief narrowly scrutinized by medical experts,—as his state would be examined were the accusation one of murder, and his plea insanity,—we are persuaded that the existence of kleptomania would not infrequently be ascertained.



The Style of Citing Cases.—Not so long ago it was the uniform practice amongst both legal writers and legal pleaders when citing a case to give—(1) the name of the parties; (2) the day, month, and year of the decision; and (3) a reference to the volume and page of the Session Cases in which the report was to be found. In not a few instances, also, we had a reference to more than one series of reports. A habit, however, has gradually crept in of curtailing the style of reference. Frequently the date of the case is altogether omitted. In more than one recently published treatise on law this shortened form has been adopted throughout the work. To us this seems to be a mistake. Judging from letters addressed to us from time to time by correspondents in the country, we gather that the change causes inconvenience

in some quarters. Many practitioners do not have the more expensive series of reports in their private libraries, and cannot always conveniently resort to Faculty libraries. To such the absence of any mention of date is a serious hindrance, and necessitates constant calculation in order to enable them to put their hands on the corresponding volume in the series of reports they possess. No ground can be seen for the change. It would be much more convenient all round to adhere to the former style. If, however, space be so precious in any law-book as imperatively to demand some abbreviation in citing cases, then we would respectfully suggest that the author might leave out the day and the month, but continue to supply us with the year of the decision.

Special Articles.

ANOMALIES OF FRANCHISE LAW.

THE law of franchise in Scotland teems with anomalies. This state of matters is, to a large extent, the result of the piecemeal legislation upon which the present qualifications and disqualifications for voting are based. In order fully to understand how these anomalies have crept into the law, it will be necessary to refer shortly to the various statutes which have from time to time made and altered the law of franchise. In the meantime we speak only of the parliamentary franchise. Prior to the Reform Act of 1832 (2 and 3 Will. IV. cap. 65), members of Parliament for counties were elected by the freeholders, and those for burghs by the town councils. By that Act, however, an entirely new qualification for voting was introduced in both counties and burghs, and the old qualifications were superseded. Section 6, however, of the statute referred to, provided "that all persons who at the passing of this Act (17th July 1832) shall be lawfully on the roll of freeholders of any shire in Scotland, or who shall then be entitled to be put on such roll, or who shall previous to the first day of March 1831 have become the owners or superiors of land

affording the qualification for being so enrolled, shall, so long as they retain the necessary qualification on which they are now enrolled or are entitled to be enrolled as aforesaid, be entitled to be registered and to vote as hereinafter directed in the election of a member for such shire." These reservations were, however, only personal, and few, if any, of the original freeholders remain on the roll of voters. The new qualifications introduced by the Act of 1832 were as follows:—In counties the franchise was conferred on—(1) owners (joint or several) of any lands, houses, feu-duties, or other heritable subjects of the clear annual value of £10 (section 7); (2) tenants (joint or several) of lands, houses, or other heritable subjects—(a) for a period of not less than fifty-seven years, or for the lifetime of the tenant, whether in his personal possession or not, where the tenant's interest after paying rent and any other consideration due by him is not less than £10; (b) for a period of not less than nineteen years, the clear value of the tenant's interest being not less than £50; (c) the tenant being in possession and the yearly rent being not less than £50; or (d) the tenant having paid a grassum of £300 (section 9). Owners required to possess their qualification for six months, and tenants for twelve months, prior to the last day of July in each year. In burghs the franchise was conferred on occupiers either as proprietor, tenant, or liferenter of any house, warehouse, counting-house, shop, or other building of the yearly value of £10, provided the occupancy had been for twelve months prior to the last day of July in each year.

By the Reform Act of 1868 (31 and 32 Vict. cap. 48) the owner's qualification in counties was reduced to £5 of clear annual value, and the tenant's qualification, if he should be in actual personal occupancy, was reduced to £14 of clear yearly value as appearing on the valuation roll. In both cases the owner's six months' possession and the tenant's twelve months' occupancy prior to the last day of July were required (sections 5 and 6). In burghs the 1868 Act conferred the franchise on every inhabitant-occupier as owner or tenant of any dwelling-house within the burgh (section 3). It also enacted, that the sole tenant of lodgings of a clear yearly value, if let unfurnished, of £10 or upwards, for the

same period as required for an inhabitant-occupier, should be entitled to the franchise, and should be enrolled if he claimed (section 4). In both cases occupancy for twelve months prior to the last day of July in each year was required. An important provision of the 1868 Act was the general saving of existing franchises. Section 56 provided, that "the franchises conferred by this Act shall be in addition to and not in substitution for any existing franchises, but so that no person shall be entitled to vote for the same place in respect of more than one qualification." It is important here to note, also, that the 1868 Act repealed nothing. The 1868 Act also created the university franchise, but it does not come within the scope of the present article.

The Reform Act of 1884 (48 and 49 Vict. cap. 3) extended to the counties the household and lodger franchise, established in the burghs by the Reform Act of 1868 (section 2). It enacted for the first time what is known as the service franchise. Section 3 provides, that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant." The tenant's occupation franchise in the counties was assimilated to that in the burghs to the effect of being lowered to £10 of clear yearly value. The 1884 Act (section 4, sub-section 1) abolished the franchise conferred by virtue of ownership of feu-duties. Section 10 saved the rights of persons registered as voters at the date of the passing of the Act. Section 12, declaring that the franchises enacted are in substitution of previous franchises, repeals the £50 county tenancy franchise and the £14 county occupancy franchise. As the franchises at present stand, there are, therefore, ten different county franchises and four different burgh franchises. Of course as the £14 tenancy qualification really repealed the £50 qualification, the repeal of the £14 qualification is really a repeal of the £50 qualification; and as an owner of heritage of the value of £10 per annum is also an owner of heritage of the annual value of £5, the repeal of the latter qualification really repealed the former.

But, nevertheless, there are still existing a number of different franchises, which ought to be abolished. It is sufficient that in counties and burghs alike there should be an owner's qualification, a tenant's qualification, an inhabitant-occupier's qualification, including the service franchise and the lodger's franchise. But there is an anomaly caused by the difference between the county and the burgh franchise which ought not to exist. An owner of property in a county is entitled to the franchise though he may not reside in the county, but an owner in a burgh in order to be a voter must be an inhabitant, if the ownership is of a dwelling-house, or the occupant at least, if it be otherwise than of a dwelling-house. We would suggest that whether in county or in burgh, ownership, if of the requisite value, ought to confer a right to franchise independently of occupancy.

Another anomaly which has existed since the Reform Act of 1832, and which is difficult to account for even in its origin, is the difference in the length of the period which is required to constitute the qualification as an owner and the qualification as a tenant or occupant, or inhabitant-occupier or lodger. Six months is the period required in the first case, twelve months is that required in the other. The idea of the distinction originally may have been that the owner's qualification, being in its nature more fixed than any of the rest, should only require to exist for half the time required for the existence of any of the rest. Now that the franchise has been extended so far, the difference becomes quite anomalous, and it is suggested that it should be removed by making the period of six months uniform for all the different franchises.

But there are other and greater anomalies arising from supplementary provisions being added to amplify or explain certain of the franchises, and being omitted with regard to others.

Thus section 12 of the Reform Act of 1832 provided for successive occupancy in burghs, enacting "that the premises in respect of which any person shall be deemed entitled to be registered, and to vote in the election for any city, burgh, or town, or district, shall not be required to have been the same premises for the whole twelve months of his occupancy,

but may be different premises, but always of the requisite value, occupied in succession by such person." This statute did not recognise successive ownership. The Reform Act of 1868, however, enacted (section 13), that "different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last day of July in any year, shall have the same effect in qualifying to vote for a burgh or county respectively as a continued occupancy of the same premises." It will be observed that this section included the owner if he happened to be an occupier, and it was decided that the occupancy must be personal occupancy, and not mere civil possession (*Learmont v. Young*, 1875, 3 R. 5). This section of the Reform Act of 1868 has been held to apply to the lodger franchise, there being nothing in the statute similar to the provision in the English statute of the previous year (30 and 31 Vict. cap. 102), which provides (section 4) that the lodgings shall be "part of the same dwelling-house." It has been held, also, that successive qualification must be uniform. Thus it has been held that it is incompetent to combine, in a county, occupancy as owner with successive occupancy of other subjects as tenant to form a qualification (*Moncrieff v. Dalglisch*, 1868, 7 M. 315). It is also incompetent to combine occupancy as a tenant in a county with occupancy of lodgings, and the same rule holds good with regard to burghs. We do not know whether it has yet been decided whether the service franchise may be combined with any other. The 1868 Act, it is true, recognised successive occupancy of dwelling-houses whether as owner or tenant, and this has now been extended to the counties by the 1884 Act. Prior to the passing of the 1884 Act, a person enrolled as a voter as tenant and occupant of a dwelling-house, was disqualified for a year if at Whitsunday he bought the house he was residing in, and continued to reside in it. The reason for this was that at 31st July he had lost his qualification as tenant and occupant, and had not been, at that date, owner for six months. But although the 1884 Act has partially removed the anomaly, namely, so far as inhabitant-occupiers are concerned, the anomaly still exists so far as other qualifications are concerned. Thus a person who occupied a mill simply as a

tenant, and paid a rent of £1000 per annum therefor, might be registered for years as a voter; yet if he bought the mill, but continued to occupy it, he would be disqualified and struck off the roll of voters for a year. The principle of successive occupancy, besides, only applies to one constituency. Prior to the passing of the 1884 Act, it had been decided that occupancy in one division of a county cannot be combined with successive occupancy in another division, where each division returns a member, so as to afford a qualification (*Stewart v. Allen*, 1868, 7 M. 315). By the Redistribution of Seats Act, 1885 (48 and 49 Vict. cap. 23), the division of burghs into divisions returning separate members was for the first time made. Section 10 of that Act provides, that "the occupation in immediate succession of different premises situate within a parliamentary borough, shall, for the purpose of qualifying a person for voting in any division of such borough in respect of occupation (otherwise than as a lodger), have the same effect as if all such premises were situate in that division of the borough in which the premises occupied by such person at the end of the period of qualification are situate." Thus, with apparently no reason for the distinction, a different rule is applied in counties in this respect from that which is applied in burghs, and in burghs a different rule is applied in the case of tenants and occupants and inhabitant-occupiers on the one hand, and lodgers on the other. Nothing occurs to us which in fairness ought to prevent the union of any one partial qualification with another, even though they be in different constituencies, unless it be the impracticability of providing for such union. It is thought that the only things which can justify the present state of the law are the difficulty of proving such partial qualifications, and also, and more particularly, the difficulty of rebutting such proof. There would also be the danger that one partial qualification in one constituency might be used for the purpose of eking out a complete qualification in several other constituencies, in each of which the claimant might have acquired another partial qualification. A very simple remedy for both difficulties might be found in a provision authorizing assessors to give out certificates of such partial qualification in one constituency, such certificates being *ex facie* evidence of the

contents, and the giving out of them operating as the withdrawal by the claimant of his right in respect of that constituency. It would follow from this that if only one certificate were given out, it could only be used in addition to one other partial qualification, so as to make it a complete qualification.

J. C. G.

(To be continued.)

THE JUDICIAL SYSTEM OF THE UNITED STATES OF AMERICA.¹

. . . THERE are at the present time in the United States thirty-eight distinct States having a sovereignty of their own, while all owe allegiance to the General Government. I will illustrate what I mean. The Courts of one State have no jurisdiction over the person or property of a citizen located in another State. Their jurisdiction is confined to their own borders. We then have making up the United States what we term eight territories. They have each a complete form of Territorial Government. . . . They are under the direct control of the Central Government located at Washington, which appoints all territorial officers and all judges.

There is also the district of Columbia, and the Indian Territory and Alaska, which are all under the Government located at Washington. You will thus understand the different phases of jurisdiction which Courts have in these different political bodies.

I should also say that the Central Government at Washington is a representative form of Government; that the members of the legislative branch are chosen directly by the people in these different States; and that the members in this branch of the Central Government have control, for instance, over the customs, internal revenue, post-office department, patents, shipping, army and navy. This legislative body passes laws in reference to these departments, and the

¹ This paper formed the subject of an address given by W. M'Donald, Esq., Counsellor-at-Law of New York, to a company of members of the profession and law students, gathered on the invitation of Mr. John P. Coldstream, W.S., Lecturer on Civil and Criminal Procedure in the University of Edinburgh, at his residence in Buckingham Terrace, on the evening of 6th February 1889. The paper has since been revised by Mr. M'Donald.

United States Courts administer the laws in reference to these departments.

The highest Court in the United States is the Supreme Court of the United States. Its sessions are always held in the Capitol Buildings at Washington. It is composed of a Chief-Justice and eight associate Justices. They are appointed by the President of the United States. They hold office for life. Their salary is £2000. I may say that this Court and the Court of Appeals of the State of New York are the only two Courts in the United States whose sittings are held with any ceremony at all, and they are the only two Courts where the judges wear any insignia of office. They simply wear in these two Courts an ordinary black silk gown.

This Supreme Court is the Appeal Court. It is not a Court of original jurisdiction. In a descending scale the next United States Courts are the Circuit Courts. There are eight Circuit Court judges. Their Circuits extend over different States; for instance, the Circuit Court of New York takes in one State, whereas some of the other Circuits take in eight or ten States, depending upon the population and amount of business done in these States. The judges of these Circuit Courts are also appointed by the President of the United States, and hold office for life, and their salary is £1200 per year.

The next division of the United States Courts are the District Courts. There are in the United States fifty-nine district judges. They are appointed by the President of the United States, hold office for life, and their salaries are either £700 or £800.

There are three District Courts in New York State. Some States have but one, others have two.

In these Courts arise actions between the citizens of different States, and their jurisdiction is limited to £400 in amount of claim. Where actions involve higher amounts, they are commenced in the Circuit Courts. They also have jurisdiction in criminal matters,—for any crime committed upon the high seas, for any crime committed upon land belonging to the United States, or any crime against postal laws, or counterfeiting, etc. So actions are first begun in the District Courts, then they go by right of appeal to the

Circuit Court, and from there to the United States Supreme Court. In the same way any action involving an amount of \$2000 or over commences in the Circuit Court, and then goes to Supreme Court. Circuit Courts have jurisdiction over all actions between citizens of different States in reference to matters where the amount involved is over \$2000. In addition to these United States Courts, there are thirty-two territorial judges.

The laws in these territories are administered wholly by officials appointed by the Central Government at Washington, the resident judge of each territory having a voice in the selection of his Court officers. The residents of a territory have a voice in framing the laws, but that is subject to veto by the Central Government at Washington. Hence laws through these territories are administered by judges who are appointed by the President of the United States. These territorial judges do not hold office for life, but hold it subject to removal by the President. Four years ago there was a change of Presidents in the elections, and President Cleveland removed twenty-eight of these territorial judges.

The territories are divided into districts, where you have District Courts in which actions originate. These different district judges in the territory form the Supreme Court of that territory, and then you go by appeal from there to the Circuit Court, and from there to the Supreme Court of the United States.

The different State Courts are so uniform, that I will describe the judicial system in the State of New York.

You will recollect that in all the United States Courts the judges are appointed. When you come to the State Courts, they are elected. In New York State the Court of Appeals is composed of a Chief-Justice and six associate Justices. They are elected by the vote of the people, and hold office for fourteen years, and are paid a salary of £1400 per year. They cannot hold office after they are seventy years of age, after which they retire on half-pay.

The political complexion of the Court frequently changes. At the present time it is Democratic. The next Court in the descending scale in New York State is the Supreme Court. The State, for judicial purposes, is divided into four

departments. The departments, again, are divided into districts. The districts cover an area according to the population. For instance, in New York State the first department takes in only the city of New York; and so as you go to more sparsely settled States, they cover a wider area. In the fourth department there are seven districts, and then there is nothing fixed as to number of districts that are located in a department.

The Supreme Court is composed of two divisions—the “General Term,” which is the Appellate Court, and the Circuit Court, which is a Court of original jurisdiction. . . . There are in the State of New York four “General Terms,” or one for each department. In some departments there are seven districts, in others there is one. In the State of New York there are thirty-nine Supreme Court judges. In the Circuit Court actions are commenced when the amount involved is over £400. The Supreme Court has original jurisdiction over actions up to that amount; from there they pass to the “General Term” upon appeal, and from there to the Court of Appeals. . . .

In each county there is one County Court. These Courts are limited as to amount involved in an action, which cannot exceed \$2000. A litigant may start an action in the County Court; from there, upon appeal, go to the Supreme Court “General Term;” and from there to the Court of Appeal.

Criminal proceedings are conducted through these same Courts, with this distinction, that the County Courts have jurisdiction only over minor crimes; for instance, trial for manslaughter is commenced directly in the Supreme Courts. The criminal has a right of appeal to the Appellate Courts. In some of the other States, especially in the States of New Jersey and Pennsylvania, there is also a Court for reviewing the evidence in a criminal case on appeal. That Court has no right to change the sentence on appeal. They can simply recommend to the Governor of the State that sentence be repealed or commuted. In New York State there is nothing of this kind; you go direct from the Circuit Court to the Court of Appeal.

For probate cases in New York State we have in each

county a Surrogate Court, which has to do with all probate matters, etc. You can appeal from the Probate Court to the Supreme Court General Term, and from thence to the Court of Appeal.

In all these Courts the officers are elected directly by the people, and none of them are appointed. A judge in New York State selects his clerk. That is the judicial system in the State of New York.

The Supreme Court judges of New York State hold their term of office the same length of time as the Court of Appeals of that State,—fourteen years,—only they must retire when they are seventy years old.

In regard to admission to practise before these different Courts, I may speak of what is necessary, what constitutes attorney and counsellor-at-law in the State of New York. There is no distinction between attorney and counsellor in the manner of practice. To be admitted you require to serve a three years' apprenticeship in an attorney's office, and then pass an examination held before Commissioners appointed by the Supreme Court. If they certify that you have passed your examination, the Court issues to you your diploma as attorney and counsellor, and you can then plead in any Court in the State of New York. The examination is not restricted to law, but is upon general subjects. A graduate of a university is entitled to deduct one year from his apprenticeship. After being once admitted to practise in the State of New York, provided you should remove into an adjoining State, or into any other State in the Union, it is customary by courtesy to admit an attorney and counsellor-at-law to practise in the Courts of that State upon a motion to that effect from any attorney in that State certifying that applicant is a counsellor, etc., in New York State, and then applicant is entitled to practise in Courts of that State.

After you have been admitted as a counsellor, etc., in New York State, by a simple motion you are introduced to the United States District Court. You will then receive certificate from them that you are entitled to practise in any District or Circuit Court of the United States. Before you can appear before the United States Supreme Court, you need to be in active practice before Circuit Court for ten years. There is

no limit of this kind before Court of Appeals in New York State.

In the manner of pleading, and the composition of law firms in America, I may say that these matters have naturally adjusted themselves; for instance, a young lawyer who is a good pleader would naturally associate himself with a more studious man, who was a good office lawyer, and who would aid him in developing his case. They would form a partnership; and, carrying out the very same idea, in New York city there are very large firms where the different partners of each firm devote themselves to different specialties. Some will be insurance law specialists, others conveyancing, etc., and some men act as pleaders; so distinction between barristers and solicitors does not exist at all.

Conveyancing forms a specialty, and examination of real estate titles is quite a specialty in New York. The examination is conducted by counsellors-at-law. Following out the idea of this specialty, there has grown up there what we call "Title Guarantee Companies," an association of men who will guarantee a title. They examine the title and guarantee it entire; and if it afterwards turns out incorrect, they will pay damages. The advantage of that association is this,—for instance, I have a guaranteed title; I wish to procure a loan of money from a bank: they will take this guarantee title as the security without any more trouble. So whenever you have your title guaranteed, you have no fees to pay to solicitors. The guarantee premium goes by the value of the property.

There are no limited liability companies in America, or rather, I should say, we have no companies with uncalled-up capital. In New York State when a joint-stock company is formed, the whole capital is paid up,—a shareholder's liability is another £100 if he takes £100 of stock. In other States when a man has paid for amount of stock he subscribed for, that ends his liability. I don't know of any company formed in America with uncalled-up capital.

Cost of Conveyancing and Litigation.

In reference to conveyancing the cost is quite expensive when done by a specialist. If you desire to procure a loan of

£1000, it would cost as much as £25 for the examination of title. There are no deed stamps in America. . . . We have no direct taxation in America at all. There are no stamps on mortgages. There is no cost for organizing a company. You don't have to pay a fee; we have simply to file articles of incorporation in the office of the Secretary of State for each State. There is no fee to Government.

As to the matter of fees for attorney and counsellors-at-law, they are a matter of bargain with their client; but if the client is shrewd, he will make it a bargain with the attorney. It is always a matter of arrangement between client and attorney. We have no fixed fees. In all the Courts the defeated party is assessed so much costs, and these costs are fixed by statute according to amount recovered and number of steps taken in the action. There is one bill of costs for original trial of the action, and another bill for each appeal. The attorney gets these fees as a perquisite. The client gets no benefit of them at all.

A common charge in America for what we call "collection" in commercial law, if action is to recover bill of goods sold, and if account does not exceed £1000, would be 5 per cent. on the amount recovered. That is the attorney's fee. The client himself would have to see to bringing witnesses to Court, and pay their expenses, etc. The attorney would keep £50 to himself; that is besides statutory fees. If bargains to conduct a case are made between clients and attorneys, they are binding on parties although the case does not go to Court. What the American looks to is the dollars and cents at the end of the litigation. If the client gets his money without a trial, he is willing to take it less the 5 per cent. collection charges.

Q.¹ In case of client agreeing to take a lesser sum, and if a settlement was made without advice and consent of lawyer, do the lawyers get the percentage on sum sued for?

A. Yes; lawyers are protected by statute. A client cannot settle a case without consent of attorney, because attorney has

¹ The questions, most of which now follow, were very numerous, and were put to Mr. M'Donald by Sir Charles Pearson, Messrs. Miller and Salvesson, advocates, and by Messrs. M'Gillivray, Martin, Pringle, and Coldstream, W.S., and others.

to discharge the case. Then, too, if money was recovered and paid to client, attorney has a lien upon the papers in his hands ; and so the attorney always gets the fee, whether client gets anything or not. I speak of 5 per cent. as a general charge, but in cases of extended litigation it is always a bargain between lawyer and client.

Q. If attorney gets his fee, and halfway through the case the client or he became dissatisfied with each other, have they any remedy ?

A. If they cannot settle their differences, they apply to the Court to appoint a referee or agree upon referee to fix the fees, etc., and attorney then delivers papers to client when he receives his fee.

Q. In case of several counsellors being employed, how are the fees arranged ?

A. That is a matter in America which is always determined by client. I, as attorney, recommend you, a client, to allow some other counsellor to join me, and you pay him additional fee. If the case was more difficult, I would recommend another counsel, and so on. The client is always out of pocket for counsel's fees, whether he wins or loses. If attorney calls in a counsellor to help him, attorney is always responsible for his fees. As a matter of honour, attorney is always responsible to counsellor for his fees. Statutory remuneration only permits of one attorney-at-law, and you can only have one bill of costs, *i.e.* for costs of one attorney only.

In the election of judges, the judges stand as candidates against each other. In New York State it is just an election by the people. A judge of the Court of Appeal is elected by all the electors of the State of New York. From the dignity of his position he is not expected to address any meetings. Last year in New York there were about 1,300,000 votes cast.

Election of Supreme Court Judge in a District.

The judge may have an opponent in that district. The political parties, as between Democratic and Republican, are pretty nearly equally divided. The first thing a judge has to work for, is to secure a nomination from the party to which

he belongs ; so it is necessary for him to drive about that district, and make himself acquainted with all the electors, and he will have to spend about a month or two in doing this. Then we have what we call caucusing. These caucuses are held throughout the district to select delegates to attend a central or district convention, and by a majority vote this convention select a candidate for a judgeship. It is necessary for the man who desires to be judge to secure in each of the divisions of the district delegates favourable to his nomination. In the more advanced districts the attorneys in practice act as the caucus. They issue an address and state the man whom they think is fittest to be judge, and they recommend the candidature of that man. . . . The people have the election of the judge in their own hands.

Q. Is it a matter of any account whether Court is of any kind of politics ?

A. Not so much now as at the time of the Civil War. The United States Supreme Court at the beginning of the war was Democratic. Since then it has been Republican ; but since President Cleveland's time two Democratic judges have been appointed.

There are appeals from District to Circuit Courts.

Q. Is that an appeal from one judge to another ?

A. No. The appeal branch of the Circuit Court is composed of one Circuit and two District judges. It may be taken before some judge who heard case originally, but in that case he would retire from the bench and would take no part in the decision, and then they (the appellants) could go from there to the decision of the Supreme Court of the United States. In case of the two judges who were left differing in opinion, they would have a rehearing with the assistance of another judge. In criminal cases if appeals go from any Court, appeal is upon matters of law and matters of fact.

Every trial is before a jury. Appeal Court judges do without a jury. The evidence is taken down by a stenographer. Each judge appoints his own stenographer, and on Circuit Courts a stenographer travels with judge.

In America if a man is tried before a jury for a crime and acquitted, there is no appeal from that.

The public prosecutor in every county is district attorney, elected by the people. Each county elects its own public prosecutor.

Q. Does not that system of election tend to partiality?

A. No, sir; I do not think that it does.

Q. Are there trials by jury in civil cases in County Courts?

A. Every litigant has a right to have his case tried by jury, no matter what is the amount of his claim. Jury trials are very much encouraged. Almost all trials of fact are by jury. The number of the jury is always twelve.

As to the length of cases. Suppose case begins in Courts of "First Instance." In New York State, it would in a matter involving £1000, if your opponent did not delay you at all, take five years to come to an end, after going through all the appeals.

You start in the Supreme Court Circuit, then the Supreme Court General Term, and from that to Court of Appeals. You would not get through these in less than five years, if your opponent did not hinder you. If he did, you might take eight years. The growth of the country has exceeded the accommodation of the Court, so that the Court of Appeals in New York States is three years behind its time. A constitutional amendment has just been passed to remedy this.

Q. When juries decide questions of fact, is there any appeal from their verdict?

A. There is an appeal from their verdict to the Appellate Court. They will review questions of fact. The Court of Appeals in New York State seldom upsets decisions of juries upon questions of fact. If decision is challenged, it goes back to another jury. The verdict has to be unanimous. The jury always goes into Court with unanimous verdict. In questions of damages they may individually vary from \$1000 to \$10,000. They will agree to \$5000 or some amount as a compromise, and be unanimous as to that amount. . . .

We have three degrees of manslaughter — first, second, and third; and two degrees of homicide, *i.e.* without provocation, and justifiable. They vary according to aggravation and provocation, etc. The distinction is intended wholly for

punishment. In the first degree of manslaughter, punishment is imprisonment for life; in the second degree, twenty years', and in the third degree, five years' imprisonment. States' juries before decision know what punishment will be. The juries know this by general information. The counsel would not be allowed to tell jury what punishment would be. Previous convictions are always taken into consideration. The public prosecutor moves for punishment; he simply moves that sentence be pronounced. It is not for public prosecutor to say what punishment will be, that is for the judge. The jury may find a man guilty with a recommendation to mercy of Court.

The judges are mostly old counsellors-at-law. They must be twenty-one years of age. Citizenship of United States is only qualification for judgeships, although sometimes the President appoints as judges persons who do not happen to be counsellors-at-law. They are sometimes appointed as a reward for political services.

Q. How do salaries range among Circuit and District judges?

A. In New York State the salaries of judges of Court of Appeals are \$7000 a year.

Salary of Circuit judge of Supreme Court, or judge of General Term, is \$5000, and \$1000 for travelling expenses. United States District judges who hold office for life have salaries ranging from \$3000 to \$4500. Circuit Court judges of United States, \$7000. Supreme Court judges, \$10,000.

County Court judges have from \$2500 to \$3000. A County judge only holds office for four years. A County judge's jurisdiction runs up to £400.

As a rule, when a successful counsellor-at-law has made a competency, he wants to become a judge. The average age of judges in United States Supreme Courts is from forty-five to fifty. Mr. Melville of Chicago, who has just been appointed judge, made \$50,000, and now as a judge he has only \$10,000.

As to hours of work, the hours are very short—11 to 2. The United States Court sits about eight months a year. The judges have always to write their opinions, there

is no *viva voce* judgment from the Bench. Their opinions are very elaborate.

At the close of the fourteen years, a judge may return to practice. He can be re-elected again. The Supreme Court judge in America, or judge of Court of Appeals, who has been elevated to the Bench, on the expiry of his time is then the most dignified counsellor in America, and demands the highest fees. It would cost you \$100 an hour to counsel with that man.

As to the matter of forms of practice before the different Courts, the practice before all the United States District, Supreme, and Circuit Courts is common law practice. When you go to New York State, we have statutory practice in the form of a Code.

There is no public executor in America. The Probate or Surrogate Court in each county administers upon the estates of intestates.

Insurance claims are one of the most common grounds of litigation.

In America most of our litigation is with corporations, and it burdens our Courts very much, because they go on the principle that they will tire the litigant out.

Lawyers in America, outside of large cities, always advertise. Attorneys' cards occupy the first column in the newspapers, and it is the correct thing to do.

The long delay in a great many cases leads to a settlement of the cases.

The mode of procedure in the Court is very simple. We have the statement of claim and answer. Revision is allowed. You can put in a supplementary claim. The sole cause of the great delay is the want of sufficient Courts to dispose of the litigations.

. . . Each lawyer makes his own bargain as he chooses. They (attorneys) do not try to undersell each other. A client may change his attorney for same proceedings.

A KAFIR LAWSUIT.

A KAFIR in the witness-box is often a surprise to those who know little or nothing of the traditions of the Kafir race. The ease with which the ordinary native parries the most dexterous cross-examination, the skill with which he extricates himself from the consequences of an unfortunate answer, and above all, the ready and staggering plausibility of his explanations, have often struck those who come in contact with him in the law Courts. He is far superior, as a rule, to the ordinary European, in the witness-box. Keen-witted and ready, he is yet too cautious ever to answer a question the drift of which he does not clearly foresee, and which when he understands he at once proceeds, if necessary, to forestall by his reply. As a result, the truth of his evidence can only be sifted by very careful proceeding on the part of the cross-examiner, and by keeping him in the dark as much as possible to the bearing of his answers upon the subject-matter of the suit. Whether this dialectic skill is innate in the Kafir, or whether it is the result of long cultivation, it is difficult to say, but as some proof of the former, we subjoin a very interesting extract from a book now unhappily becoming rare, viz. Colonel Maclean's "Handbook of Kafir Laws and Customs, compiled from Notes by Mr. Brownlee, Rev. Dugmore, and Mr. Ayliff," which will, we venture to think, throw a great deal of light upon the present abilities of the descendants of those whose judicial customs fifty years ago are so graphically described in the following words:—"When a Kafir has ascertained that he has sufficient grounds to enter on an action against another, his first step is to proceed, with a party of his friends or adherents armed, to the residence of the person against whom his action lies. On their arrival they sit down together in some conspicuous position, and await quietly the result of their presence. As a law party is readily known by the aspect and deportment of its constituents, its appearance at any kraal is the signal for the mustering of all the adult male residents that are forthcoming. These accordingly assemble and also sit down together within conversing distance of their generally unwelcome visitors. The two parties perhaps survey each other in silence for some

time. 'Tell us the news,' at length exclaims one of the adherents of the defendant, should their patience fail first. Another pause sometimes ensues, during which the party of the plaintiff discuss in an undertone which of their party shall be 'opening counsel.' This decided, the learned gentleman commences a minute statement of the case, the rest of the party confining themselves to occasional suggestions, which he adopts or rejects at pleasure. Sometimes he is allowed to proceed almost uninterrupted to the close of the statement, the friends of the defendant listening with silent attention, and treasuring up in their memories all the points of importance for a future stage of the proceedings. Generally, however, it receives a thorough sifting from the beginning; every assertion of consequence being made the occasion of a most searching series of cross questions. The case thus fairly opened, which occupies several hours, it probably proceeds no further the first day. The plaintiff and his party are told that the 'men' of the place are from home, that there are none but 'children' present, who are not competent to discuss such important matters. They accordingly retire with the tacit understanding that the case is to be resumed next day. During the interval the defendant formally makes known to the men of the neighbouring kraals that an action has been entered against him, and they are expected to be present on his behalf at the resumption of the case. In the meantime the first day's proceedings having indicated the line of argument adopted by the plaintiff, the plan of defence is arranged accordingly. Information is collected, arguments are suggested, precedents sought for, able debaters called in, and every possible preparation made for the battle of intellects that is to be fought on the following day. The plaintiff's party, usually reinforced both in mental and material strength, arm the next morning, and take up their ground again. The opponents, now mustered in force, confront them, seated on the ground, each man with his arms at his side. The case is resumed by some advocate for the defendant requiring a restatement of the plaintiff's grounds of action. This is commenced perhaps by one who was not even present at the previous day's proceedings, but who has been selected for this more difficult stage on account of his debating abilities.

Then comes the tug of war ; the ground is disputed inch by inch ; every assertion is contested, every proof attempted to be invalidated, objection meets objection, and question is opposed by counter-question, each disputant endeavouring with surprising adroitness to throw the burden of answering on his opponent. The Socratic method of debate appears in all its perfection, both parties being equally versed in it. The rival advocates warm as they proceed, sharpening each other's ardour, till from the passions that seem enlisted in the contest, a stranger might suppose the interests of the nation at stake and dependent upon the decision. When these combatants have spent their strength, or one or other of them is overcome in argument, others step to the rescue. The battle is fought over again on different ground, some point either of law or evidence that had been purposely kept in abeyance being now brought forward, and perhaps the entire aspect of the case changed. The whole of the second day is frequently taken up with this intellectual gladiatorship, and it closes without any other result than an exhibition of the relative strength of the opposing parties. The plaintiff's company retire again, and the defendant and his friends review their own position. Should they feel that they have been worsted, and that the case is one that cannot be successfully defended, they prepare to attempt to bring the matter to a conclusion by an offer of the smallest satisfaction the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal (to the Chief). Should the plaintiff at length accede to the proposed terms, they are fulfilled, and the case is ended by a formal declaration of acquiescence."—*The Cape Law Journal*.

LEGAL PUZZLES.

II.

A. DIVORCES his wife B. on the ground of adultery. Subsequently B. obtains fresh evidence which enables her completely to vindicate her character by showing a clear case of mistaken identity, and the decree of divorce is reduced.

Meanwhile A., who has acted in complete *bona fide* in suing his divorce, was in the belief that he is once more a single man, promised marriage to C. and been intimate with her, the result being a child D. Thereafter A. has broken with C. and been intimate with E., who has borne him a child F. Subsequently to F.'s birth A. has married E., who has thereafter borne him another child G. Upon obtaining reduction of her divorce, B. on her part raises an action of divorce for adultery against A. C. and E. raise actions for breach of promise of marriage and seduction against A. D., F., and G. all raise actions of declarator of legitimacy against A. What happens in the different actions?

The first question is, whether a wife is entitled to obtain decree of divorce against her husband on account of intimacy had by him with other females during the period between a decree dissolving his marriage with the pursuer, and a subsequent decree reducing the decree of reduction. The answer to this question will turn very much upon the effect of the two decrees in relation to each other. Viewed retrospectively, what was the position of parties during the interval between the decrees? In the light of the second decree can the first be said to have dissolved the marriage? After the first decree the parties believed themselves to be, and were in the eye of the law, divorced persons; are they now to be regarded as having really been during that period divorced persons? Did the second decree not merely revive the marriage, but restore to the married lives of the party the period intervening between the two decrees? We think there can be no doubt the second decree annuls the first and all that has followed thereon, to the effect that now in the eyes of the law the parties were married people throughout. The other view, that during the interval the parties were not married, would lead to an extravagant result. If A. were single, his marriage with E. would have been a valid marriage, and accordingly when the decree of divorce was reduced he would have had two lawful wives.

Now if the marriage still subsisted, notwithstanding that the husband was under the *bona fide* belief that it was legally dissolved, his position was analogous to that of a man who is himself under a mistaken belief that his wife is dead. It

is an open question whether a marriage contracted under these circumstances entitles the absent spouse on turning up to obtain divorce for adultery. The question was treated by the Scottish Courts as such in the case of *Donald v. Donald*, 1863 (1 M.P. 741). The opinions of Pothier ("Tr. Mar.," No. 416), Fraser ("H. and W."), and the first Lord Moncreiff (*Thomson v. Bullock*, mentioned *ibid.*) are against the divorce, and in this matter they follow the Canon law (Sanchez, 10. 5. 11). The Roman law, however, allowed the divorce (Nov. 117, cap. 11, and Nov. Leo 33), and this is the view taken by Erskine (1. 6. 64). Accordingly, if A. had done no more than marry E. whilst the decree of divorce stood, it is extremely doubtful if B. could have obtained a divorce for adultery after that decree was set aside. But unfortunately before he married E., B. not only committed fornication with her but also with C. Now it might plausibly be argued that however heinous his incontinence, inasmuch as A. honestly believed his marriage to have been dissolved, his offence was not one against his marriage vow, was not morally adultery, and ought not to be made ground of divorce. In strict principle there is much to be said for this contention, for adultery is a ground of divorce, not because adultery is heinous,—many other offences are worse,—but because it is a breach of the marriage covenant. The whole weight of authority, however, is in favour of allowing divorce in the circumstances figured (Sanchez, 10. 5. 12; Merlin, "Repert. *voc* Legitime;" Pothier, "Tr. Mar.," No. 416; Toullier, 1. No. 637; Fraser, "H. and W." 1143; *Donald v. Donald*, 1863, 1 M.P. 741). Yielding to this consensus of authority we must hold that B. is entitled to obtain her divorce on account of adultery committed by A. with C. and E.

C. sues A. for breach of promise of marriage and seduction. The answer is taken that A. being a married man the contract was one incapable of fulfilment, and that no damage, therefore, was sustained through the breach. But it has been found that when a married man promises marriage to a woman, who believes him to be single, an action for breach of promise of marriage will lie at her instance (*Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Exch. 775). This is hardly logical, for the injury is the promise, not the breach; but

logical or not, it seems to be the law. It may be answered, however, that in the present case A. was guilty of no deception, for he was under an honest and reasonable belief that he was a free man. So far as regards the breach of promise, this objection would be unanswerable if A. had resiled from the promise only on discovering that he was still married to B. But his marriage to B. had nothing to do with the breach with C. He was still under the impression that he was single when he broke his promise with C., and therefore it is not in his mouth to plead his marriage with B. as barring C.'s action. When the question comes to be one, however, of assessing damages for the breach, the fact that A. was already married is a relevant consideration. The question then is what is the amount of injury suffered, and that will not be the loss of a marriage with B., but merely the loss of time during the engagement with A., and the injury to feelings sustained. For the seduction, C. is entitled to full damages.

E.'s action against A. for breach of promise of marriage and seduction is on quite a different footing from C.'s. A. fulfilled his promise to E., in so far as in him lay; he married her, or, at all events, he went through a form of marriage with her, and that this marriage proved to be null is an innocent misfortune for which A. is not responsible. To advert to an illustration already given, the case of A. and E. is on the same footing as if they had entered into a marriage whilst both under a *bona fide* and reasonable belief that A.'s wife was dead, and that wife had subsequently turned up. In such a case no action for breach of promise will lie. The question of seduction is a more difficult one. Had the intercourse taken place only after the form of marriage, there would have been no case of seduction. But A. was familiar with E. previous to this ceremony, and is he now entitled to plead this entirely nugatory proceeding as barring E.'s action of damages for the injury done her by the previous connection? In order to resolve this difficulty it is necessary to inquire what seduction is. Now mere carnal intercourse with an unmarried female is not seduction. There must in addition to this be the use of some deceit, and that deceit of a peculiar character. To induce a woman to surrender her virtue for a

certain price, and then to refuse to pay the money, is not seduction. The destruction of chastity amounts to seduction only where virtue is surrendered in reliance either upon an express promise of marriage or professions of honourable attachment, or where the respective ages or the relations of the parties impose upon the man a duty of protection towards the female. In the case of seduction obtained by a promise of marriage, it is no defence that at the time the seduction took place the man honestly intended to fulfil the promise of marriage. Here, again, the law is hardly logical. The real offence—the true ground of action—is not the sexual intercourse, but the breach of promise. The prior loss of virtue is strictly an aggravation of the breach of promise rather than a substantive ground of action, seeing that though virtue had been lost no ground of action had emerged until the breach took place. The law, however, does not so regard it, but treats breach of promise and the seduction as separate substantive grounds of action. But to found an action of seduction there must be deceit or undue influence. Apart from this, when a woman surrenders her virtue, the law holds her to be equally guilty with the man, and will not allow damages although the injury may be much greater to the woman than to the man. Now, in the case in hand, did A. use any deceit or undue influence? It would appear not. He meant to marry E., and he fulfilled his promise in so far as he could. A grievous misfortune has no doubt overtaken E., but it is only a misfortune, not a wrong. She was not seduced, for the seduction cannot emerge until a promise of marriage is wilfully broken, and this has not occurred. E. therefore fails in her action on both heads.

D., F., and G. all raise actions of declarator of legitimacy. G.'s case is the simplest, and may therefore be disposed of first. He was born, it will be recollected, whilst A. and E. both believed that they were lawfully married. Now, when one or other of the parents through an error *in fact* believes in the validity of a null marriage, children born during the subsistence of the error are legitimate by the common law and by the law of Scotland (Fraser, "Parent and Child," 22 *et seq.*). It has been expressly laid down that this rule applies to the case of a party marrying another woman on the faith of a

decree of divorce in his favour, and having children by her, although thereafter the decree should be reduced and the first marriage be declared to be still subsisting (*ibid.*, 29; Boehmer, iv. 17, 35). Accordingly G. succeeds in his action of declarator of legitimacy.

F.'s position differs from G.'s, in so far as F. was born before the marriage ceremony between A. and his mother. But he contends that had this marriage been a valid one he would have been legitimized by virtue of it, and that the parties having been in entire *bona fide*, he ought not to be prejudiced by the fact that the marriage is null. But this reasoning is fallacious. No man can be legitimized *animo* merely of his parents. There must also be a concurrent *fact*, viz. the marriage of his parents. Here that fact is absent. There may be the wish and intention to legitimize, but a child born illegitimate cannot be made legitimate by the mere wish or intention of his parents. There must be the marriage. Here there is none; neither at the date of conception nor of the marriage ceremony were the parties in a position to marry. The child is not to be prejudiced by a null ceremony, but as little is he to take benefit from it. This was the Canon law, and is followed by all the authorities who deal with the matter, with one exception (Sardis, "Tr. de nat. lib. Tractat," vol. viii., part ii., p. 137; Voet xxv., 7, 8; Pothier, "Tr. Cont. Mar.," part v., ch. 2, sec. 2; D'Agnesseau, vol. iv. p. 261; Merlin, "Rep. Univers. tit. Legit.," sect. 2, sub-sect. 2; 1 Burge Com. 97; Riddell, "Peer. and Cons. Law," p. 512; Fraser "Parent and Child," 28; *Contra* 1 Duchesne 689). Accordingly F. fails in his action of declarator of legitimacy.

D.'s action proceeds upon the theory of the constitution of marriage by promise *subsequente copula*. It has been much disputed whether promise *subsequente copula* constitutes very marriage, or whether it amounts only to a binding obligation to marry, and requires subsequent solemnization or a declarator of marriage to complete. It is unnecessary, however, to dispose of that question for the solution of the matter here at issue.

D. argues that if A. had not been already married, his promise to C., and the intercourse following upon it, which resulted in his birth, would have constituted a marriage, and

thereby rendered him legitimate. Both parties were in *bona fide* when the intercourse took place, and the child ought not to be prejudiced by the subsequent emergence of the impediment. But even on the most favourable view of marriage by promise *subsequente copula* this reasoning will not hold. No marriage in fact took place, and the elements of *bona fide* present in the case of a regular and honourable marriage ceremony were here wanting. Notwithstanding the humane view which the law has taken of *copula* following upon a promise of marriage, it is still *stuprum*, and indeed by the ecclesiastical courts down to the beginning of last century it is denounced as whoredom. It is plain, therefore, that D. cannot plead the conduct of his parents as possessing such elements of honour and *bona fide* as to constitute a *putative* marriage and render him legitimate. He fails therefore in his action.

The result then is, that B. succeeds in her action of divorce, C. in her action for breach of promise of marriage and seduction, and G. in his declarator of legitimacy; whilst, on the other hand, E. fails in her action for breach of promise and seduction, and D. and F. in their declarators of legitimacy. We leave it to the moralists to determine whether it is now A.'s duty to marry C. or to marry E., that is of course assuming that they are both still willing to marry him in the reduced circumstances in which his litigations have left him.

Obituary.

MR. WILLIAM BURNES, S.S.C., Edinburgh, of the firm of W. and J. Burnes, died on 3rd July. Mr. Burnes was admitted a member of the Society of Solicitors before the Supreme Court in 1861.

MR. ANDREW DAVIDSON, solicitor, died on 8th July, at the age of 86. Mr. Davidson retired from business some time ago, after having practised in Perth for fifty years.

MR. HENRY GORDON DICKSON, W.S., Edinburgh, died on 21st July, in his seventieth year.

The Month.

The Private Bill Procedure Bill.—Much regret will be felt at the withdrawal of this Bill. Of the four measures comprised in the Ministerial scheme of Local Government Reform in Scotland, that dealing with Private Bill Inquiries was by far the most important and the most urgently required. It could be least spared. There was no desire in Scotland, certainly no *expressed* desire, for the reform of Local Government; but this Bill, though included in the scheme, had no connection whatever with Local Government. It was designed to remove an obvious grievance, and the proposals it contained were well adapted to secure that end.

* *

The Boundary Commission.—Sheriff Crichton has been nominated as one of the Boundary Commissioners under the Local Government Bill now passing through Parliament. The powers of the Boundary Commissioners do not begin until immediately after the first election of County Councillors, *i.e.* in January 1890. But the work will be very considerable when it does begin, and the Commission will last for two years. It is questionable, therefore, whether the Sheriff of the Lothians will be able to overtake the judicial work of his extensive jurisdiction during the period of his Commissioner-ship. Probably an interim appointment will be necessary.

* *

Autumn Circuit Courts.—The following arrangements have been made:—SOUTH.—The Lord Justice-Clerk and Lord Adam. Ayr—Tuesday, 27th August, at eleven o'clock; Dumfries—Thursday, 29th August, at eleven o'clock; Jedburgh—Wednesday, 4th September, at eleven o'clock. Mr. D. M'Kechie, Advocate-Depute; Æneas Macbean, Clerk. WEST.—Lords Young and Wellwood. Inveraray—Tuesday, 6th August, at 10.30; Stirling—Thursday, 8th August, at eleven o'clock; Glasgow—Wednesday, 14th August. Mr. James Wallace, Advocate-Depute; J. M. M'Cosh, Clerk. NORTH.—Lords Shand and Kyllachy. Perth—Tuesday,

24th September; Inverness—Thursday, 26th September; Dundee—Tuesday, 8th October; Aberdeen—Thursday, 10th October. Mr. Duncan Robertson, Advocate-Depute; Horace Skeete, Clerk.



AN action was brought in a Wisconsin Court some years since, for shooting the plaintiff's goose and gander. The defendants admitted the killing, but claimed that it was accidental. After hearing the evidence, the Court delivered the following able and lucid opinion:—

"It is always best not to be too severe on damages, and yet it is best to give damages to the amount of the plaintiff's claim, and inasmuch as the killing of those geese was wrong by the boys. It is the opinion of the Court that the two geese were worth two dollars apiece in the *spring of the year*, and in all probabilities they would have had twelve goslings, and probably about one-half of them would have lived and the other half would have died; and it would not have cost the plaintiff much to keep them until fall, and the goslings would then be worth one dollar apiece, which would be six dollars, and the two old ones two dollars, which would make ten dollars, which is the judgment of the Court."



It has been decided in the United States (*State v. Linkhaw*, 69 North Carolina 214; s.c. 12 Am. Rep. 645) that the unintentional disturbance of a religious congregation by discordant singing, when the singer is conscientiously taking part in the services, is not indictable!



THERE was a very irascible old gentleman who formerly held the position of Justice of the Peace in one of our cities. Going down the main street one day, one of the *boys* spoke to him without coming up to his honour's idea of deference.

"Young man, I fine you five dollars for contempt of Court."

"Why, judge," said the offender, "you are not in session."

"This Court," responded the judge, thoroughly irritated, "is always in session, and consequently always an object of contempt!"—*The Green Bag*.

* * *

Judge (to Witness). Do you know the nature of an oath?

Witness. Sah?

Judge. Do you understand what you are to swear to?

Witness. Yes, sah; I'm to swar to tell de truf.

Judge. And what will happen if you do not tell it?

Witness. I 'spects our side 'll win de case, sah.—*Albany Express*.

* * *

ONE of the judges of the West Virginia Court of Appeals tells the following as having actually occurred when he was examining an applicant for licence. The applicant was of mature years, having previously held the office of Justice.

Judge. What are the requisites of a valid will?

Applicant. Can't tell 'em all, judge; but I remember one is that it must be read at the burial over the grave of the testator.

Judge. What is a fee simple?

Applicant. I guess about two dollars and a half.

Judge. What is the largest estate in land?

Applicant. A very large estate would, in this country, be about one thousand acres.—*Virginia Law Journal*.

* * *

Law Clerks (Ireland) Bill, 1889.—The Council of the Incorporated Law Society of the United Kingdom have presented a petition against the Law Clerks (Ireland) Bill, by which it is proposed to enact that any person who produces satisfactory evidence that he has faithfully, honestly, and diligently served as a solicitor's paid clerk for a term of fifteen years, and who has been examined and paid the duty and fees similar to those for the time being payable by apprentices bound by indentures, may be sworn, admitted, and enrolled and registered as a solicitor.

It is assumed that the examination referred to means the

final examination only, and therefore a person may be admitted to practise without any test whatever as to his general education and without having served under articles of clerkship.

The Bill also provides that any person who has for a term of seven years been a law clerk, and who produces satisfactory evidence as to faithful, honest, and diligent service for that period, and who has passed the preliminary, intermediate, and final examinations, and who has paid the duties and fees as aforesaid, may, without any service under articles, be admitted, enrolled, and registered as a solicitor.

Law clerks seeking to become solicitors under the provisions of the Bill will have to apply to the Incorporated Law Society of Ireland, stating their desire to be examined and the section under which they apply, and must furnish with their applications the necessary evidence.

If the Society should be satisfied with the evidence, they will have to issue a certificate to the effect that the clerk is entitled to be examined, and thereupon the clerk will, upon payment of the duty, be entitled to be examined accordingly.

The Incorporated Law Society of Ireland may refuse to give such certificate on the ground that the applicant is not a law clerk who has been engaged, or on the ground of the moral unfitness of the candidate. Such refusal must be given in writing to the applicant, and must state the grounds on which the refusal is based, and any applicant objecting thereto may appeal to the Lord Chancellor of Ireland.

The Bill contains a power under which the Lord Chancellor, the President of the Queen's Bench Division of the High Court of Justice in Ireland, and the Master of the Rolls in Ireland, or any two of them, may, in special cases, exempt applicants from the necessary examinations, either wholly or partially, or subject to such conditions as they may think fit. It therefore follows that, if the Bill should become law, it would be possible for a law clerk to become a solicitor without serving under articles or passing any examination whatever.

The Incorporated Law Society of the United Kingdom, which comprises upwards of 6000 solicitors practising in the United Kingdom, entertains in the interests of both the public

and the profession the strongest possible objection to the Bill, which appears to aim at reversing the efforts which have during the last fifty years been successfully made by solicitors to raise the educational and social position of members of their profession, and to better enable them to perform honourably and adequately the responsible and confidential duties imposed upon them.

It is submitted by the Law Society that service under articles of clerkship and passing the required examinations constitute a fitting training to the individual, and are necessary protections to the public who employ and place confidence in solicitors.

The preliminary examination in general knowledge established in Ireland followed and was founded upon the English Solicitors Act, 1860, which for the first time established a preliminary examination. The provision in the Act of 1860 for exemption in special circumstances from the preliminary examination, formed no part of the original scheme of that measure; but, as the Act established for the first time a preliminary examination, it was felt that some hardship might be inflicted on those persons who had been looking forward to entering into articles, and thus found a new and unexpected barrier placed in their way. To obviate this anticipated hardship, a discretionary power was vested in certain of the judges to grant exemptions, either wholly or in part, from the preliminary examination, but this power is now rarely exercised. The Law Society state in their petition that only six orders for exemption were granted during the past year, and that in every case there were special circumstances which satisfied the judge by whom the order was made that the applicant had acquired a fair education.

In the opinion of the Law Society the special circumstances which would justify exemption from the preliminary examination are either—(1) the applicant having passed some equivalent though not legally prescribed examination; or (2) having been prevented by illness, or other like cause, from qualifying in early life for the prescribed examination, and having subsequently acquired a liberal education and training, though not of the minute and detailed kind necessary to satisfy examiners.

The Legislature, in establishing an examination in general knowledge, intended to secure that those who sought to enter an honourable and learned profession should be adequately qualified, by general education as well as by legal knowledge, to fill that position with credit to their profession and satisfaction to their clients; and to admit persons as solicitors, without any other qualification than service as an ordinary paid clerk for a term of years, would be a violation of the principle upon which the preliminary examination was established, and is as unnecessary as it is unreasonable, because, under the existing law, clerks who have served for ten years or upwards may be admitted as solicitors after service under articles for three years, and passing the usual examinations—including the preliminary examination. In England such clerks seem, until recently, to have been under the impression that they could, as a matter of right, not only be relieved from two years' service, but be also exempted from the preliminary examinations. This error has now been corrected, owing to the consistent manner in which the Lord Chief-Justice and the Master of the Rolls have exercised the discretion which is now solely vested in them.

We believe that no exemption is now granted unless the applicant can show that he has passed some fairly equivalent examination, or that he has in early life received a fairly good education, though the state of his health would not permit him to undergo the necessary study to enable him to pass the examination.

Orders for exemption have, however, been made on the understanding that the applicants should pass the examination within a given time, generally twelve months. This is not, however, a satisfactory plan, because a clerk must, on entering into articles, pay the stamp duty of £80; and if he should afterwards fail to pass the preliminary examination, he would put this circumstance forward as a reason for exempting him from the examination.

In no other profession are persons who are unable or unwilling to pass the necessary examinations allowed to enter by side-doors; and until a parish clerk can, because he has served for a number of years in that capacity, become a clergyman on passing an examination in divinity; or a doctor's

servant can become a physician on the same terms; or a servant to an officer in the army become himself an officer; or a barrister's clerk become a barrister on passing the requisite examination,—so long should solicitors strenuously oppose attempts like that proposed in the Law Clerks (Ireland) Bill to lower the status of the profession, by allowing persons of inferior social position to enter it without service under articles and passing the proper examinations.

The *Law Times* remarks that the state of the law in England on this point is bad enough as it now stands, and if the Bill in question is allowed to pass for Ireland, its extension to England will only be a matter of time. We therefore hope that the legal members in Parliament will be in their places when the Bill comes on for second reading, and will succeed in negating such a pernicious measure.—*Irish Law Times*.



IN New York, *L. E. & W. R. Co. v. Burns*, New Jersey Court of Errors and Appeals, May 17, 1889, it was held that a common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot through its train officials lawfully require him to vacate a seat which he is occupying in the car to which he has been duly assigned. The Court said: "Whether his relation to the company was that of servant or passenger, his right to transportation rested in contract, the difference being merely in the form of the agreement. In either case, in the absence of anything to the contrary, the right to transportation will be held to include the ordinary incidents of railroad carriage. The terms offered plaintiff by the defendant included passage each way to and from Jersey City. This he accepted, and the defendant cannot now import into the contract any radical departure from its ordinary significance. If something different from an ordinary right of passage was intended, some intimation should have been given plaintiff at the time the offer was made and accepted. If pursuant to some regulation of the company the right to occupy a seat during the transportation contemplated by the agreement was a conditional right only, then actual notice thereof should have been given plaintiff, in order that the parties might

deal with each other with equal knowledge. Plaintiff was not employed to work on the train, hence notice of train regulations will not be imputed to him. His work was at a terminus, and the offer of carriage as part of his compensation did not disclose anything different from an ordinary passage. It is true he was an employé of the company, and hence was subject to obey reasonable instructions from the proper officials. Had he intruded into a car reserved for ladies, or unsuitable for his accommodation, he might have been required to leave it for another one; but when his immediate boss had indicated the smoking-car as the proper place for him, and it came down to the question of his right to be seated, he was not bound to take from the train-hands orders which would in effect deprive him of an essential part of his contract, and perhaps expose him to dangers for which he had not stipulated. The arguments of counsel for defendant, based on the supposed analogy between private master and servant and the present case, are inapplicable, for the obvious reason that the contracts of a common carrier for carriage must always take colour from the *quasi* public character of the chief contracting party. I may compel my servant to vacate the seat I have assigned him to in my carriage for the same reason that I may refuse to receive him in at all, notwithstanding he offer me money for his fare."

Reviews.

The Crofters' Holdings (Scotland) Acts, 1886, 1887, and 1888. With an Introduction and Notes, and an Appendix containing the Rules of Procedure, etc. By CHRISTOPHER N. JOHNSTON, M.A., Advocate. Second Edition. Edinburgh: T. & T. Clark.

It is not surprising that Mr. C. N. Johnston's excellent handbook of the Crofters' Act has reached a second edition. In its new form the book is considerably enlarged. Not only are

the amending Acts of 1886 and 1887 now given with annotations, but the notes to the Act of 1886 have also been carefully revised and added to, especially in the light of judicial decisions. For this purpose Court of Session Reports, Sheriff Court Reports, and the Annual Reports of the Crofters' Commissioners have been consulted and laid under contribution. Not a few of the difficulties which are suggested in the first edition have become the subject of judicial decision, and it is no small tribute to Mr. Johnston's sagacity that these, for the most part, have been decided in accordance with the views there expressed by him. This edition also contains the Rules and Table of Fees prepared by the Commissioners, and among the Forms (which seem complete) is a new valuable series relating to the Loans to Fishermen by the Fishery Board. These and other additions and improvements add immensely to the usefulness of the book, making it a complete digest of Crofter legislation down to date. Mr. Johnston's book in its new form will be indispensable to all who are in any way concerned or interested in the administration of these Acts.

H. S.

An Exposition of the Principles of Partnership. By JAMES PARSONS, M.A., Member of the Philadelphia Bar, and Professor in the Department of Law and of Philosophy at the University of Pennsylvania. Boston: 1889.

THIS book would be greatly improved if the learned author would in future editions strike out the Preface and the Introduction, for the pompous tone of superiority there adopted at once predisposes the reader to regard the rest of the work unfavourably. The Introduction commences by telling us that Mr. Parsons "is astounded by the statement which both Lindley and Pollock, the leading authors who have written upon the subject, concur in making, that the law of partnership is ripe for codification. They intend by this statement to convey the meaning, that the principles of the relation having been fully established, can be expressed in definitions and upheld in formulas. How do they succeed in demonstrating the feasibility of the project? They stumble and halt on the very threshold. The definition of partnership

breaks them all (*sic*) up." Messrs. Lindley and Pollock having been thus "broken all up," and "the meaning they intended to convey" having been explained to mean nothing by Mr. Parsons, it is consoling to find from the Preface that the law of partnership is yet not altogether in a state of chaos; far from it. We learn that he has been assisted in his labours by Dwight M. Lowrey, Esq., and that his "suggestions and criticisms have contributed to clear up some of the principles of partnership law." Let us be thankful that we have a Parsons and a Lowrey to take the place of a Lindley and a Pollock. We learn from the title-page that Mr. Parsons is a professor "in the department of law and of philosophy." We trust his law is more profound than his philosophy, for we are told that "the present book will illustrate my method of handling the law, and that the point to which I directed the attention of my students is, that cases are the exponents of principle, and that back of the facts (*sic*) lies the reason which explains them." Did Lindley and Pollock ever enunciate so profound an aphorism as this? The earnest student may have heard before that "honesty is the best policy," but surely never that the principle of law is exemplified by cases.

"The occupation of watching the acting forces of the law," we are told, "captivates and absorbs the mind," and the final result is that "the graduates of the University of Pennsylvania exhibit the advantages of studying the law in the scientific spirit," and would not exchange the method thus acquired for any other. Happy students! Happy professor! Both so pleased with themselves and with each other.

It is fair to add that the rest of the book is greatly superior to what the Introduction would lead one to expect.

Analysis of the Conveyancing (Scotland) Act, 1874, and Amending Acts of 1879 and 1887, and Notes on the Cases which have been decided relative thereto. By JAMES S. STURROCK, Writer to the Signet. Edinburgh: Bell & Bradfute, Publishers.

IN our recent notice of Mr. Ferguson's work upon railway law, we took occasion to record a protest against the fragmentary

character of much of our present legal literature. The work before us gives us occasion to renew that protest. When an important new Act is passed, it is natural, and indeed necessary, that a handbook elucidatory of its provisions should be produced. The law upon the subject may be up to date otherwise, and a complete treatise may therefore be unnecessary, and in any case practitioners cannot wait until some one has produced an elaborate work upon the whole branch of law affected, and brought it down to date by weaving in the provisions of the statute. But a new work upon a statute fifteen years old is out of date, unless indeed that statute is a complete code of the branch of the law dealt with and superceding all prior law and legislation. The Conveyancing Act of 1874 did nothing of the kind. As every lawyer knows, there was an important series of cognate statutes which were consolidated by the Titles to Land Act of 1868. The Acts of 1868 and 1874, with the small amending Acts, and the case law since 1868, really constitute a complete compendium of modern Scottish conveyancing. What a lawyer wants, if he wants anything at all, is not a work on the one Act or on the other, but a treatise on the whole law as embodied in the two Acts, the amending Acts, and the cases down to date. We repeat what we affirmed in reviewing Mr. Ferguson's work: "If there is one thing more desirable than another about a law book, it is to be able to turn to it, knowing what one will get in it, and that one will get what one wants. It is most important that the whole law under any particular branch should be collected in one volume, or, at all events, in one work under a single index." If there is a demand for a new work upon recent conveyancing legislation; if all the treatises which have been written upon the subject, Hendry's "Manual," Begg's "Conveyancing Code," Mowbray's "Analysis," the last editions of Montgomery Bell's "Conveyancing" and of Bell's "Principles," the first volume of the "Juridical Styles," Craigie's "Conveyancing," etc., are out of print, antiquated, or otherwise unsatisfactory, by all means let us have a new treatise; and there is no one more capable of compiling it than Mr. Sturrock. But why select this fragment, large fragment though it be, of recent legislation, and embody it in a separate handbook? No doubt there is a class

of mind which carries along with it a familiar recollection as to where each item and detail is to be found, and which will never turn to the Act of 1868 for something which is to be found in the Act of 1874, just in the same way as there is a turn of mind which is never for one moment at a loss as to a Lord Ordinary's blank day. But this class of mind, besides being otherwise objectionable, stands in no great need of an elucidatory handbook. The case of the plain Christian is quite different. He does want a handbook, and above all a general index. All that he has in his mind is a hazy notion that the point which puzzles him is dealt with in one or other of the conveyancing statutes, he does not know which. For this class, and it comprises within it the larger and the more amiable portion of the profession, these fragmentary handbooks are a weariness and a snare. One might just as well have one dictionary which contained only words of Anglo-Saxon origin, and another only classical derivations.

Having said so much, we have said all that is to be said against Mr. Sturrock's work. Radically wrong as we think it in conception, within the unfortunate limits which he has laid down, Mr. Sturrock could hardly have produced a better work. His handbook contains all that is of value in Mowbray, with much original matter and copious elucidation of recent case law upon the subject. There is a full and clear index, and a list of all the conveyancing cases since 1874. The printing and get up are excellent, the only fault being that the difference of type between the text and the notes does not always catch the eye quite readily.

English Decisions.

JUNE—JULY.

(All current English Decisions likely to throw light upon any point of Scottish law or practice are here reported.)

MARRIED WOMAN.—*Separate estate—Real estate—Documentary evidence—Statute of Frauds.*—Plaintiff, a widow, claimed part of her deceased husband's real property, on the ground that it had been bought with money belonging to her for her separate use. There

was no documentary proof of this, but evidence of a verbal admission by deceased was offered. *Held* (by Mr. Justice Kekewich), that by Statute of Frauds the land must go to the heir-at-law of deceased. If a married woman, with money belonging to her as her separate property, allows her husband to take it and invest it in the purchase of real estate, without having any conveyance or declaration of trust executed in her favour, she cannot afterwards claim that real estate.—*Williams v. Hudson*, High Court, Ch. Div., 18 June 1889.

TRUSTEE.—*Investment of trust funds on insufficient security—Liability of retired trustee—Sale of mortgaged property without notice to retired trustee.*—The defendant, while sole surviving trustee under a will, invested £1300, part of the trust funds, upon a first mortgage of some freehold cottages, which had been valued at £1750. The cottages afterwards became depreciated owing to certain docks not being finished in the neighbourhood. Subsequently defendant retired from the trust, and appointed new trustees, to whom he transferred the trust-estate. Three years later, the interest on the mortgage not having been paid, the new trustees sold the property for £800. The sale was effected without notice to defendant, who was thus deprived of the opportunity of replacing the whole sum advanced and of taking over the security. In an action brought on the ground that defendant had not acted prudently in making the investment, *held* (by Lords Justices Cotton, Bowen, and Fry, reversing Mr. Justice Kekewich), that defendant in making the investment had not acted as a prudent man, and was liable for any deficiency arising therefrom, although no notice of the intended sale had been given him.—*Re Salmon, Priest, & Uppleby*, Ct. of App., 19 June 1889.

COPYRIGHT.—*Book—"Title"—Registration—Copyright Act, 1842, sects. 13, 24.*—Plaintiffs brought an action in a County Court for alleged infringement of copyright in an illustrated catalogue of shop fittings sold by them. In defence it was contended that the "title" of the book had not been registered in accordance with the requirements of sections 13 and 24 of the Copyright Act, 1842 (5 and 6 Vict. c. 45), and that, therefore, the action was not maintainable. Plaintiffs registered the title as "Illustrated Book of Shop Fittings,"—words which did not occur in the catalogue. The outside page consisted of the name of plaintiffs' firm and a description of the contents of the catalogue. At the foot of the first page inside were the words "Illustrated Catalogue and Price List." It appeared that in plaintiffs' catalogue for 1885 the same words, occurring in the same place, had been registered as the title; and in that for 1883 the words "Illustrated Price List," which occurred in the same place, had been registered as the title. The County Court judge held that as the title had not been registered, the registration was defective, and the defendant was entitled to judgment. This judgment was reversed by the Divisional Court. On appeal, by leave, *held* (by the Lord Chief-Justice, and Lords

Justices Lindley and Lopes), that the words "Illustrated Catalogue and Price List," as interpreted by the action of the plaintiffs, constituted the title of the book; and that as those words were not registered, the defendant was entitled to judgment. *Opinion per Lord Chief-Justice*, that a statement that the book had no title, coupled with a description of the book, would be sufficient registration.—Ct. of App., 22 June 1889.

WRONGOUS IMPRISONMENT.—*Attachment for debt and attachment for contempt—Sheriff—Sheriffs Act, 1887, sect. 14.*—Judgment against the plaintiff in the present action having been obtained in the Salford Hundred Court, an application was made to the judge of that Court for his committal under the Debtors Act. Being of opinion that the plaintiff had the means of paying the judgment debt, and that his failure to do so was wilful, the judge ordered him to be committed to prison for twenty-one days from the date of his arrest, or until he should pay the amount of the judgment. Plaintiff was arrested in London, and taken to a police-station there; he was then removed to Manchester and lodged in gaol. He raised the present action against the judge of the Salford Hundred Court for wrongous imprisonment, on the ground that defendant was not justified in taking him to prison within twenty-four hours of his arrest, without first allowing him to nominate "some convenient dwelling-house" to which he was willing to be taken, in terms of section 14 of the Sheriffs Act, 1887 (50 and 51 Vict. c. 55). Mr. Justice Manisty non-suited plaintiff. On a motion for a new trial, *held* (Mr. Justice Denman and Mr. Justice Charles), that the non-suit was right, on the ground that section 14 of the Sheriffs Act did not apply, the present case not being one of attachment for debt within the meaning of the section, but of attachment for contempt.—*Mitchell v. Simpson*, High Court, Q. B. Div., 26 June 1889.

EVIDENCE.—*Admissibility—Revoked codicil—Declaration against interest.*—In an action brought to administer the estate of a testator, his widow claimed to be entitled absolutely to certain jewels which he had, in his lifetime, delivered to her for her use. The matter in dispute was whether the jewels had been given to the wife absolutely, or only for her use during her life. The executors wished to use as evidence a codicil made by the testator, and afterwards revoked by him, and which stated that he had given the jewels to his wife for her life. *Held* (Lords Justices Cotton, Fry, and Lopes, affirming Mr. Justice North), that the statement in the codicil was not a declaration against interest, and that it was not admissible in evidence.—*Re Bowes*, Ct. of App., 28 June 1889.

TRUSTEES.—*Costs—Apportionments between Cestuis que Trustent—Lien.*—A tenant for life brought an action against trustees in respect of the income of the trust, and a judgment for inquiries was given.

Subsequently it was held that the action had been unnecessary, and that the plaintiff therein was liable in the costs of the trustees, as between party and party. The tenant for life ultimately became entitled to two-sevenths of the *corpus* of the fund. The tenant for life being dead, the question was raised in the present summons as to the lien of the trustees on the trust fund in respect of their costs as between solicitor and client, and charges and expenses of the former action. *Held* (by Mr. Justice North), that the trustees had a lien on the whole trust fund for their costs, etc., but that the said costs were payable, in the first instance, out of the interest of the tenant for life, including his two-sevenths of the *corpus*.—*Re Allen, Wheeler, and Forster*, High Court, Ch. Div., 1 July 1889.

MAINTENANCE OF INFANT.—*Executor—Conveyancing Act*, 1881, *sect. 43*.—Personal estate having been bequeathed to an infant absolutely, the question arose whether the executor under the will was a "trustee" within the meaning of *sect. 43* of 44 and 45 Vict. *cap. 41*, so as to empower him to apply the income of the property for or towards the infant's maintenance, education, or benefit. *Held* (by Mr. Justice North), that, subject to the payment of debts, funeral, and testamentary expenses, the executor held the property upon trust for the infant, and could apply the income thereof in the manner authorized by the section.—*Re Smith : Roe v. Hitchens*, High Court, Ch. Div., 2 July.

PATENT—Threats—Action to restrain—Patents, Designs, and Trade Marks Act, 1883.—Section 32 of the Patents, Designs, and Trade Marks Act of 1883 is as follows:—"Where any person claiming to be the patentee of an invention by circulars, advertisements, or otherwise, threatens any other person with legal proceedings or liability in respect of any alleged use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage, if any, as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal right of the person making such threats; provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." The defendants, on 21st September 1887, threatened an action against the plaintiffs on the ground of infringement of patent. On 27th September the plaintiffs brought this action to restrain the threats; and on the 30th the defendants brought the action for infringement against the plaintiffs having previously brought an action for infringement against another person, K., which they were still prosecuting. *Held* (by Mr. Justice Kekewich), that the defendants' action against the plaintiffs, was commenced and prosecuted with due diligence;

that the action against K. was not within the proviso; but that when the action against the plaintiffs was commenced, their rights in respect of threats were gone; and that defendants were entitled to judgment; but that the defendants were not entitled to costs, because they ought to have sued by way of counter-claim or have stayed proceedings. — *Combined Weighing and Advertising Machine Co. v. Automatic Weighing Machine Co.* — High Court, Ch. Div., 5 July 1889.

MARRIED WOMAN—*Breach of contract—Breach of trust—Tort—Separate estate—Married Women's Property Act, 1882.*—Defendant, who was a married woman, agreed by deed in 1876 to grant to V. a lease for ninety-nine years of a piece of land, when he should have built a house thereon according to agreement. V. had the option of purchasing the feu on giving notice agreed on. In 1877 he assigned the agreement and option in mortgage to the plaintiffs. Subsequently, in 1878, the defendant, unknown to the plaintiffs, conveyed the fee to V., and he mortgaged it to other persons. On all three occasions the same solicitor acted for all the parties concerned. The plaintiffs claimed that the defendant had notice of their mortgage through the solicitor, and that her separate estate was chargeable with the amount due on the mortgage. *Held* (by Mr. Justice Kekewich), without deciding whether defendant had notice through the solicitor, that, even assuming she had, the defendant had not committed a tort, but either a breach of trust or a breach of an implied contract; and that this would not have rendered a married woman's separate estate liable before the Married Women's Property Act, 1882; and that section 1, sub-section 2 of that Act is not retrospective as to engagements by a married woman. — *Davies v. Stanford*, High Court, Ch. Div., 6 July 1889.

SHIPPING.—*Collision at sea—Fog.*—The persons in charge of the steamship H., in a dense fog, heard a steam whistle about three points on their starboard bow, and about half a mile off. Though they denied the fact, Mr. Justice Butt found at the trial that they then starboarded, and stopped their engines; and shortly afterwards collided with the steamship V. He found that the V. was to blame for excessive speed and improper porting; and also held the H. to blame for starboarding, being of opinion that in a dense fog a vessel ought not to act with its helm before seeing the other vessel. On appeal, *held* (Lord Esher, M. R., and Lords Justices Cotton and Lindley), that there was no rule that when those in charge of a vessel in a dense fog hear a whistle in their vicinity they are not to manœuvre with their helm before seeing the other vessel; that, even assuming that the H. had starboarded, that was a proper manœuvre; and that in fog collisions the propriety of acting with the helm must depend upon the circumstances of each case. — *Case of the Vendomora*, Ct. of App., 8 July 1889.

Sheriff Court Reports.

SHERIFF COURT OF ORKNEY AND SHETLAND, AT LERWICK.

Sheriff MACKENZIE.

THE following is Sheriff Mackenzie's interlocutor in the Hoswick Whale case. The facts of the case appear fully in the interlocutor:—

"*Lerwick, 18th June 1889.*—The Sheriff-Substitute having heard parties and considered the cause, along with the proof and productions: Finds—(1) That the pursuer is a *pro indiviso* proprietor of certain lands at Hoswick, in Zetland; (2) That on the 14th September 1888, a shoal of whales was stranded on the sea-shore of or adjacent to the said lands of which the pursuer is proprietor as aforesaid; (3) That the whales were driven and slaughtered in the ordinary manner in which this operation is carried out in Zetland; (4) That on 17th September the salvors or the persons who had been engaged in driving the said whales ashore authorized the whales to be sold by auction, and that sale realized the sum of £450, 12s. 1d.; (5) That a committee of the salvors, who, under reference to No. 7 of process, are the defenders in this case, took possession of the said sum and advertised for claims in the local newspapers; (6) That under reference to the particulars contained in the subjoined note the custom alleged by the pursuer has in a very large number of instances prevailed, but that it has not invariably done so; and that there have been instances in which the alleged rule has not been observed, and in which it has varied, and that the alleged custom has not been submitted to by the salvors without great complaint, and in some cases has given rise to more formal though ineffectual protests; (7) That the custom in Orkney is opposed to that alleged by pursuer: Finds in law that the custom alleged by the pursuer is not sufficiently inveterate, uniform, or uninterrupted, and is not of a kind to derogate from the ordinary rule of law with regard to wild animals: Finds that the pursuer is not entitled to the sum sued for: Therefore assoilizes defenders from the conclusions of the action, reserving all claims by the pursuer for damage which may have been done to his property by the operations of the defenders: Finds the defenders entitled to their expenses, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court, to tax and report; and grants warrant to the defenders to uplift the consigned fund, and authorizes the Clerk of Court to pay over the same accordingly; and decerns.

(Signed)

"DAVID J. MACKENZIE.

"*Note.*—This is an action of a very peculiar character. It is brought by a proprietor of lands in Zetland against certain defenders who represent the captors or salvors of a shoal of whales, which were driven to land and killed after a fashion common in this country, at a part of the mainland of Zetland where the pursuer, along with others, is a *pro indiviso* proprietor. The claim of the pursuer is founded on title and usage, and a proof of that usage has been led in its support. The defence, besides the pleas of irrelevancy and incompetency, which have already been dealt with, amounts to this, that even should such a usage exist, which is denied, it is not usage or custom of a kind which can constitute law. There are other minor points of defence as to the payment of the expenses of flensing the whales, and as to the pursuer's title to the foreshore below high-water mark. The defenders at the same time offer to pay their share of any damage which may have been done to the beach by their operations. The pursuer's title to the lands in Hoswick is contained in No. 67 of process, being a disposition in his favour which contains a clause as to 'pertinents.' It has already been held in this Court that in Orkney and Zetland the foreshores belong to the riparian proprietors, as all the lands are udal or allodial (*Pottinger v. M'Combie & Co.*, 1887). The question of title, however, is not the main point of dispute in the case, for the usage alleged by the pursuer is of a wide and general character, apparently irrespective of narrow distinctions between high-water mark and low-water mark. It is that 'the heritors of Shetland having as a pertinent of their lands, and by the laws, usages, and rights of the said islands, right to one-third share of all caaing whales stranded and killed on the seashores of their respective lands. The pursuer being a proprietor of 33 merks 2 ures land in the town or room of Hoswick, is entitled to decree for £69, 7s 3d., being the proportion effeiring thereto of the heritors' share of the whales before referred to.' This is the allegation of a usage which would interpret the expression 'pertinents,' and determine the extent of the pursuer's right under his title. The pursuer is met at the outset of his case by the difficulty that a claim of this particular nature is elsewhere unknown to the law. It is a claim to the possession, or at least to a share in the possession, of wild animals. By the Roman law (*Digest* xii. 1. 1. 1. and 1. 3., *Justinian* ii., i. 12. 13., *Gaius* ii., 66. 67.) a wild animal, when caught, belonged to its captor. (*Puffendorf* iv., vi.; *Grotius*, *De Jure*, B. ac. P. ii., ii. sect. iii. 2, and sect. iv. and v.) This rule forms part of the law of Scotland. (*Stair* ii., i. 5. 33; *Erskine* ii., i. 10.) An exception, which at first sight might lead to difficulty on this point, is made in the case of 'whales.' It is not contended, however, by either side that the caaing whale, the animal at present in question, comes under the designation of 'royal fish' (see *Erskine* ii., ii. 10, and reference to *Leges Forestarum*, sect. 17); and even though the Crown at one time, either through the admiral or otherwise, exercised any right in these whales, there is none now claimed; and on the last occasion on which this matter formed the subject of

action (*Scott and Others v. Reid and Others*, 11th July 1838), it was pointed out by the Lord Ordinary, that if the pursuers as proprietors were entitled to one-third, it was immaterial to the issue how the other two-thirds were disposed of. Provisions are found in Mediæval Codes as to certain oil fish (Rolles d'Oléron, xxxvii.), but there is no evidence in this case which would differentiate a casing whale from an ordinary wild animal, except the main custom in dispute. The contention that any other law than the law of Scotland falls to be applied in this case has been dealt with in the case above referred to, and the Lord Ordinary's remarks on that head need not be repeated. Nor have any foreign lawyers been adduced in this case to inform the Court as to foreign law. In the case above referred to (*Scott and Others v. Reid and Others*, 11th July 1838, unreported), the question of custom was decided by the Lord Ordinary in a conjoined action of advocacy and declarator. That judgment is necessarily of great weight; but I have considered that while it is binding on the parties to it, and of retrospective effect as a declarator, it must be taken along with the other evidence which has accrued during the fifty years that have passed since its date. The parole proof is mainly confined to the last fifty years, and I may here state in a general way its import. In the year 1838 there were whales driven ashore at Hillswick. This shoal consisted of 300. L. Robertson, who speaks of it, was a tenant on the Busta estate, on which it was driven. The proprietors took a third, though not without a grudge on the part of the men. The witness says that was the custom all his remembrance, 'but notwithstanding, it was with a grudge. They got it because we had to give it. Possibly it was through fear. I suppose if we had objected to give it, the proprietor could say we could leave his property; and we had nowhere else to go at that time.' This passage is quoted as being, practically speaking, a brief compendium of the plea which runs through the whole case of the defenders. In the same district, some three or four shoals were stranded at various dates between 1841 and 1852. The witnesses to these cases agree in saying that the landlord's share was given unwillingly, and with a sense on the part of the men that they would be turned out of their holdings if they resisted the landlord's claim. The documentary evidence as to this estate shows that in the Estate Regulations a reservation was made of the proprietor's right to one-third of whales, and this reservation is repeated more briefly in a lease dated so recently as 1886. At Haroldswick in Unst there were shoals in 1847, 1863, and 1864, and there is no evidence of grumbling on the part of salvors, although John Spence (p. 8) remarks, 'They' (the salvors) 'had no opportunity of preventing the landlords getting it.' At Uyasound and Sandwick, also in Unst, there were whales stranded in 1849, 1864, and 1871 and 1886. In the latter year objections appear to have been made by the men, but came to nothing. At Cullivoe in North Yell some opposition was made to the landlord's claim to a third of a shoal stranded there in 1886. Mr. Sandison, whose brother and partner

(now deceased) acted as clerk, says, 'Mr. Hamilton, the landlord's factor, gave in a protest of use and wont—as a thing that had been done in time past. The men gave in, I understand, because they thought the case was too small to push.' At Vatster, Mid Yell, in 1864, a shoal appears to have been divided without complaint according to the alleged custom. On the Lunna estate there is evidence regarding a number of whales. In 1852 there was a shoal in which the proprietor did not claim a share, according to L. Henderson (p. 196), although this seems to conflict with No. 20 of process. In 1854, at the same place, the proprietor got a third of the value of the whales. In 1852, at Laxo, on the same property, the same thing took place. Some whales shot by William Hunter (p. 217), and by Dempster Lawrenson (p. 225), at Vidlin and Vasso, appear also to have been subjected to the landlord's claim, although much against the will of the captors. The latter explains that he would have kept his share but for the feeling that if he did so his father would have to leave his holding. At Scalloway a shoal was stranded in 1870. In this case a very distinct protest was made by the captors. A deputation of them waited on Mr. Hay, the proprietor, and pointed out a peculiarity in the case that the whales were killed while floating,—a distinction which is somewhat difficult to appreciate,—and asked him to forego his claim. Mr. Hay refused. The men seem to have lost heart, and looking apparently to the expense of a contest, and the fact that most of them were Mr. Hay's tenants, they took no further action. The district of Weisdale is one in regard to which a considerable mass of evidence—and that not of the clearest kind—has been adduced. The custom appears to have varied in this place. It is difficult to follow the varied expressions used by the witnesses, but to my mind their meaning is, that in Weisdale, more than in any other part of the country, it has been customary to kill the whales at sea, or at least before they have come ashore. The older practice also appears to have been that the men kept the whales without sharing them with the proprietors. 'Up to that time,' i.e. when the land came into Mr. William Hay's hands, 'the Weisdale men had refused to give the landlord anything. In old times they carried the fish away.' Since Mr. Hay's time there has evidently been a tendency on the part of the men to kill the whales at sea, so as to evade the landlord's claim. This practice, again, has been met by the infliction of 'fines' and 'punishments' on those who did so. Mr. Hay states quite frankly, that 'it was a condition of their holding the place that they were not to prevent the whales landing.' In my opinion there has not been such a consistent practice in Weisdale for the prescriptive period as would establish the custom alleged. On the Quendale property there is evidence of a number of shoals from the year 1843 till 1868. In all of these, the proprietor shared to the extent of one-third. Mr. Grierson admits the fact of the men having grumbled, but says that they did so no more than about other things—such as private property in land. On the property of Sand there were frequent

shoals. In an old instance (1835) some at least of the captors kept their full shares. On other occasions the custom alleged appears to have prevailed. In the year 1871 a shoal of whales was captured in Lerwick Sound, and driven aground on the shores of Lady Nicolson's property. The blubber was bought by Mr. Leask, and he, notwithstanding a protest by the salvors, paid one-third of the price to the proprietrix and two-thirds to the men. James Angus, one of the salvors, says, 'The share was taken from me against my will.' In the districts of Walls and Sandness there is evidence as to some shoals of a very early date. In 1824 or 1825 a shoal was driven in Lerra Voe, and the proprietor took no share. Some years later, in 1828, the shoal occurred which gave rise to the litigation which was terminated by Lord Cockburn's judgment of 11th July 1838. Lastly, the evidence as to the pursuer's own property, or of property in which he had a share, or in his neighbourhood, falls to be noted. There is a considerable quantity of evidence with regard to whales from 1820 to the date of the shoal now in dispute. In the earlier cases there appears to have been little expressed objection to the landlord's claim. At Channerwick, in 1832, there is evidence that some at least of the men carried off their full shares, and that the dispute was aggravated by the proprietor claiming a half instead of a third. In 1834—although the dates are not very clear—it appears that some of the Sandwick men refused to give up their shares to the proprietor on whose shores the whales had come. In 1843 there were whales at Sandwick and Hoswick. On that occasion it is proved that the question was openly discussed between the salvors and the proprietor. The men formed a committee, and approached the proprietor with a statement that they meant to keep the whole of the proceeds of the whales. Mr. Bruce, the landlord, replied that they might take it, but that he would raise the rent. The men, concluding that whales came only occasionally, while rent is a constant charge, gave way. At other shoals, in 1853 and 1865, the proprietor got a third of the proceeds, but on the latter occasion not without a somewhat heated dispute with the captors. The books produced by the pursuer contain a record of the division of the shoals on his property. To put the result of the proof shortly, it appears that in a great majority of the occasions spoken to, the proprietor obtained his one-third share. The exceptions are at Vidlin in 1825, at Lerra Voe in 1826, at Flotta in 1857, various instances at Weisdale, one instance at Melby, and the cases in which the captors who were not tenants of the proprietor of the lands refused to give up their full claims (see James Manson and the other instances mentioned above). The proof led as to the stranding of the whales in the present case leaves the impression in my mind that the animals were driven and killed in the usual way, with the additional circumstance, if it be of any weight, that none of them were brought above high-water mark. With regard to the documentary evidence, it, of course, mainly consists of writings by the proprietors themselves; and except where these writings constitute contracts

with individuals, it is obvious that they can only be taken as evidence of the alleged custom from the proprietors' point of view. The complaints, grumblings, and refusals of the captors are not recorded. We only now hear them from the lips of men, some of whom are far advanced in years. As to what I may call the literary and historical evidence, it has to be looked at as competent, contemporary, and, so far, skilled evidence, but on a subject which even in the earlier years of this century had given rise to controversy. Due allowance must be given for the warmth of opinions, and care must be taken to eliminate evidence to contemporary fact from expressions of economic theory. The question of the whole evidence, oral and written, as I apprehend, may be stated thus, 'Has such a usage been proved as entitles the pursuer as a heritor in Zetland to the share of the proceeds of whales which he claims?' That the usage of a particular locality may derogate from the general rule of law is clear. It is also, I think, obvious that Zetland forms a locality of sufficient definiteness and historical individuality to entitle it to a distinct consideration of its custom. It is not simply a small estate, as in *Allan and Thompson* (7 Shaw, p. 784). At the same time it must be remarked that by the minute of admissions in process (No. 97), the custom in Orkney is admitted to be different from that alleged by the pursuer, and that there no claim by the landlord to a share in the caaing whales is recognised. For the reasons set forth in my previous interlocutor of 13th February, I think this consideration is relevant and important. The nature of the usage itself has to be considered apart from its locality. According to Erskine I., i. 43, unwritten law is that which without any express enactment of the supreme power derives its force from its tacit consent, which consent is presumed from the inveterate or immemorial usage of the community. Local usage, in order to be available, must be proved to be uniform and notorious (*Morrison v. Allardyce*, 2 S. 434), uninterrupted and uniform (*Scott v. Wilson*, February 4th, 1829). Is the usage alleged here founded upon the consent of the community? or is it immemorial, inveterate, uniform, and uninterrupted? Unless it complies with these conditions, it cannot alter the law. First, as to consent. No one who has carefully considered the proof here led can say that this landlord's share was given with the consent of the captors, unless that consent is construed as the choice of submission to a burden under the knowledge that a greater harm would come from resisting it. It is quite possible to strain this consideration into something like an absurdity. Every payment or claim, such as rent or taxes, is no doubt felt by many to be a hard thing, and one that they would gladly be relieved from, but which they, for obvious reasons, are compelled to pay. The difficulty in this question arises from the fact spoken to by a large number of witnesses, that the payment of this claim became associated in the minds of the people with the tenure of their homes. It, in fact, and apart from special agreement, formed no part of the rent of land properly speaking, as the landlords on their side would demand, and have demanded, it from those who

were not their tenants. But the fear that the refusal would be followed by removal runs through almost the whole of the proof. It cannot be said that this fear was altogether fanciful. In 1843 Mr. Bruce stated that if his share was kept he would lay it on the rent. One witness stated that he said he should lay 5s. on every merk of land. Similar evidence is to be found in the testimony of W. Robertson, W. Hunter, Robert Robertson, James Manson, and others. Another difficulty in the way of forcing their claims, which the salvors had to contend against, arose from the circumstance that the proceeds of the sale of the whales was generally lodged with the proprietor or his factor, and consequently except by raising an action at law there was no method of disputing the division of the money. There is no doubt that the landlords in these proceedings were acting in perfectly good faith, and in a belief that the share was no exceptional impost, but a tribute which was legally theirs. Equal credit must be given to those other proprietors of an opposite opinion who did not seek to enforce their right. This leads to the consideration of the uniformity and uninterruptedness of the alleged custom. The case at Vidlin in 1825 is sworn to by L. Henderson, but the production No. 20 of process bears that in that year a shoal came to Vidlin, of which the landlord got not a third, but a half. In 1824, 1825, 1826, 1827 this landlord appears to have got a half of the whales as his share. This claim of a half appears elsewhere in the proof, and the case of *Stove v. Colvin* (May 26, 1831, 9 S. 633) shows that the present claim of a third is not consistent with the older practice. At Lerra Voe in 1826, again, there is evidence of interruption of the custom. At Flotta, which is in the Weisdale district, in 1857 there were whales which paid no tribute, although it must be remembered that there is some evidence as to these having been killed at sea, and not in the usual way. The evidence of Dempster Laurensen, L. Henderson, William Hunter, however, shows that on some occasions whales shot in the open sea have been subjected to the landlord's share, which forms another variation in the custom, which, to have full force, must above all things be uniform. Other instances of varied practice in Weisdale are to be found in Thomas Williamson's evidence. This witness speaks to whales taken ashore, not driven, as he expresses it, on Mrs. Jack's property. The proprietrix made no claim, and the gratitude of the captors towards her took the form of a 'hundredweight of blubber.' James Mitchell gives some interesting evidence as to disputes. About the year 1836 a shoal came to Sand. The men disputed the proprietor's share, 'and some captors, as far as I know, got their full shares.' In 1862 a distinct interruption of the alleged custom is spoken to by Laurence Anderson (p. 213). He also speaks as to a relinquishment of the share by Dr. Black in Weisdale. On another occasion 'we, the captors, told Mr. Robertson to pursue, but he never did.' Mr. Henderson, speaking of the shoals at Spiggie, says that he was a proprietor, and although his share was sent to him, he never put in a claim for it, and adds, 'if the full share was given

up to the salvors altogether, I would never put in a claim as a proprietor.' In 1832, at Channerwick, it is clear that many of the salvors carried off their full shares. It is here to be remarked, as in former instances, that when the salvors did not happen to be tenants there was less difficulty in asserting their claims. On this point the evidence of James Manson (p. 258) is instructive. As late as 1871, and on the only occasion in which whales are spoken to in Lerwick Sound, a protest of a somewhat formal account appears to have been made by the men, but was disregarded. An instance in 1839 or 1840, spoken to by George Slater, must also be noted. It may be said that the weight of the evidence is to the effect that, as matter of fact, the landlord's share of one-third has been deducted or paid in the great majority of cases spoken to, but that usage has not been free from interruption and variation. It has been accompanied by continual complaints, and has been successfully resisted principally by those between whom and the proprietor of the shore the relation of landlord and tenant did not exist. I am of opinion that the alleged right of the pursuer has not been proved by the evidence of custom which has been led, as that custom, so far as it has been led, has not been uniform, has not been exercised without objection, and has not been uninterrupted. In connection with the defenders' plea-in-law, it is a significant fact that, on the first occasion on which the distinction between those who are tenants and those who are not loses much of its force,—that is, the first occasion of a whale hunt after the passing of the Crofters' Holdings (Scotland) Act of 1886,—the captors have determined to have their rights asserted, and this harassing matter put to rest. They took what appears to have been a reasonable course in advertising for claims before this action was raised. This is a very exceptional case. I am not insensible to the apparent hardship which the cessation of such payments in respect of whales may occasion to those who have looked upon them as legally due, and I do not forget that property may have changed hands under such impression. This is to be regretted; but an exceptional custom must be proved by exceptionally strong evidence, and I do not think, although I arrive at the conclusion with difficulty, that the proof led is sufficient to establish the pursuer's claim.

(Intd.)

"D. J. M."

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Maybrick Case.—This case has been discussed in every aspect in the daily and weekly press; we have nothing to add to the lucid and powerful treatment which it has there received at the hands of many careful commentators. We hold that the guilt of Mrs. Maybrick is proved beyond all reasonable doubt. The real difficulty of the case lay not in any doubts as to the prisoner's guilt, but in the strong impression which had laid hold of the popular mind that her guilt had not been established. If capital punishment is to be maintained, and we think that it ought to be maintained, it is not expedient to enforce it in cases where its infliction shocks popular sentiment. On the other hand, capital punishment cannot be maintained if a criminal guilty of deliberate cold-blooded poisoning is to escape its doom. Here was the Home Secretary's dilemma. Mrs. Maybrick was proved to have given poison to her husband, and therefore a conscientious public officer could not in deference to popular clamour interfere with the course of justice. On the other hand, a great portion of the community, backed by strong scientific opinion, believed Mrs. Maybrick not to have been proved to be guilty, and in these circumstances it was not in accordance with public policy that she should be executed. How was the Home Secretary to escape, on the one hand,

from declaring her innocent who was proved to be guilty, and, on the other hand, from shocking popular sentiment and impairing respect for the law, by hanging a prisoner in defiance of popular opinion? The device adopted of holding that Mrs. Maybrick is proved to have administered the poison with murderous intention, but that it is not proved that Mr. Maybrick died from the effects of the poison, was perhaps as good a way out of the difficulty as could well be found. At best, however, it is but a device. If it be proved that A. administered or attempted to administer arsenic to B.: that thereafter B. sickened and died, with many of the appearances of arsenical poisoning, that arsenic was found in his body, and that medical men could suggest no other cause of death: if in these circumstances A. is not proved to have murdered B.—well, nobody need be afraid of being hanged for poisoning.



Skilled Evidence: A Canine Tragedy.—A singular case was tried the other day before Mr. Sheriff Mark at Portsburgh. Timkins, a local greengrocer, had complained several times to Blewson, a cab proprietor, of the annoyance occasioned him by the night howling of a Newfoundland watch-dog in Blewson's yard. Blewson took no notice of the complaints. The dog, however, was found one morning, apparently in great agony, vomiting and retching. After lingering for a couple of days in much suffering, the poor animal died. On a *post mortem* examination, two grains of arsenic were found in its body. The stomach and intestines were much inflamed. There was all the appearance of death by irritant poisoning, and the veterinary surgeons who made the *post mortem* examination could suggest no other cause of death. Blewson raised an action against Timkins for £20 as the value of the dog, alleging that Timkins had poisoned the animal. It was proved that Timkins had threatened to poison the dog, and that on the day before the dog sickened he purchased a quantity of arsenic. The same evening he was seen in Blewson's yard throwing biscuits to the dog. Fragments of these biscuits, which were found, contained clear traces of arsenic. For the defence Timkins called two medical

experts, who never saw the dog, but who deponed that in their opinion the case was not one of arsenical poisoning, because diarrhoea, tenderness of the stomach, and redness of the eyes, all symptoms of arsenical poisoning, had not been observed. The Sheriff decided in favour of the defender. The evidence, he said, led clearly to the conclusion that the defender administered or attempted to administer arsenic to the dog, but it did not wholly exclude a reasonable doubt whether its death was in fact caused by the administration of arsenic.

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Leaders and Juniors.—Lord Justice Lopes, in the course of hearing a case, said that he noticed that Mr. Myburgh, Q.C. (who appeared for the plaintiffs), had no junior counsel with him, and he added that he had been so long away from this kind of work that he hardly knew what the practice was. Mr. Myburgh said he had at first refused to accept the brief, but the Attorney-General having been referred to said that he was bound to accept it. Lord Justice Lopes believed that the view of the Attorney-General was conclusive in the matter, and he had referred to it more from curiosity than anything else.

The former rule of etiquette, as we understand it, was that a Q.C. could not appear for a plaintiff without a junior except on motions for a *mandamus* or for a rule *nisi*. A leader could, however, conduct a defence single-handed. This rule has now nearly disappeared, although the fact that Mr. Myburgh thought it right to consult the Attorney-General shows that the shadow of it still remains. Several of our contemporaries have raised a wail of disapproval in sympathy with the sufferings of the Junior Bar. They all, however, treat the question as entirely one of *etiquette*. So treated, the old rule is, we think, hardly defensible. If a leader is able to conduct a case single-handed, it is preposterous that etiquette should saddle the litigant with the expense of two counsel. On the other hand, if the opinion of the Attorney-General went further than this, that the leader cannot plead etiquette against the acceptance of the brief, surely the Attorney-General was wrong in saying that a leader is

bound to accept a brief single-handed. In Scotland, at all events, and we are surprised if it is not so in England also, a leader is entitled to say: "I cannot give my whole time to-morrow to this case;" or, "It is impossible for me to work up all the minor details of this case. You must give me a junior; or if you cannot do that, I must send back the papers." A system which disallowed such a course would render the position of a leader often quite intolerable. In jury trials in England, a junior is still necessary, because in a jury trial the proceedings are opened to the jury by the junior; while in cases without a jury, the leader begins and opens the case.

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An unqualified Practitioner.—The Solicitors Act imposes a penalty upon any one falsely implying that he is qualified to act as an attorney or solicitor. Dobney, an accountant and music-seller, at Newark, was summoned at the Newark Borough Police Court for an infringement of the Act. The defendant had addressed to one Winn, a tailor at Gainsborough, a letter in these terms: "Take notice that I am directed to take legal proceedings against you for the recovery of £15, 1s., balance due to Messrs. Mumby & Co., unless the same be paid at my office on or before Monday next." It was argued for the defendant that the Legislature had never intended that a man should be held to have committed an offence who wrote a letter for the recovery of a debt, and that it was a usual practice for tradesmen to place debts in the hands of accountants for collection. The magistrates, however, were of opinion that the Solicitors Act had been infringed, and they imposed a penalty of two pounds.

* * *

Local Government Act.—The Local Government Bill for Scotland has passed through all its stages in Parliament. The changes which have been made on the measure, though of importance in the practical working of the Act, in no way essentially change the lines which were sketched in the Lord Advocate's speech in introducing the measure. But there will be general regret that two out of the four Bills announced in that speech have not passed into law;

and the regret will be especially keen in the case of the Private Bill Procedure Bill, which, it is hoped, is only postponed for a session. The two Bills which contained the Government scheme of Local Government for Scotland have (as was all along intended) been welded into one Act of Parliament. No important change has been made as regards the powers transferred to county council authorities from existing bodies. But in the case of burghs, royal or parliamentary, which the Act for certain purposes includes in the county, the method of electing county council representatives has been entirely changed. The original proposal involved a direct popular election simultaneous with the municipal election. This has been abandoned in favour of election of these representatives by the town councils. The Registration provisions have been greatly altered. In consequence of the change just mentioned relating to the election of burgh representatives, county council registration in those burghs is unnecessary; and by throwing open the franchise to all service voters, it has been possible to simplify the registration proceedings considerably.

Very useful amendments have been made with the view of defining the county and the burgh areas, in regard to which the Bill as first introduced left something to be desired. In rating an equitable alteration has been made by inserting the provision, that while all rates for the principal and interest of past borrowed money shall be levied on owners until the loans are repaid, rates for future debts shall fall on owners and occupiers in the same way as any other rates. The part relating to Exchequer contributions has been very much altered owing to the greatly increased sum which is to be devoted to payment of school fees. On this account the proposal to pay over to each local authority the proceeds of the licence duties collected therein, and, if expedient, to empower it to collect these duties, has been abandoned. Under the Act the proceeds of the licence duties in Scotland and a fixed amount of the Probate Duty are to be paid into the Local Taxation (Scotland) Account by the Commissioners of Inland Revenue, and distributed in a prescribed manner under the direction of the Secretary for Scotland. Among other changes of less importance are the introduction of a disqualification section,

which *inter alia* disqualifies women from being county councillors; the conferring of a discretion in the matter of dividing certain counties into districts; the restriction in the choice of convener to county councillors; the postponement of the first county council elections from December 1889 until February 1890; and the consequent postponement of all county registration in 1889, whether for parliamentary or county council purposes, for two months. From this note of the more important changes made on the Bills in the course of their progress through Parliament, it must be obvious that the Government scheme has been adopted in all its essential parts, and (if a prophecy may be hazarded) it is a scheme which is certain to work smoothly and efficiently.

* * *

Rae v. Meek: The Liability of Trustees.—The judgment of the House of Lords in the case of *Rae v. Meek*, decided the other day, had been generally anticipated by the legal profession. Mr. Meek, as trustee, had, on the advice of the law agent to the trust, been a party to the investment of certain trust-funds on the security of unfinished buildings, and the investment turned out a bad one. Certain beneficiaries raised an action against the trustees and also against the law agent. The disposal of the case before seven judges of the Inner House of the Court of Session led to a curious difference of opinion. The judges were unanimous in holding the investment to be a bad one, but here the unanimity ended. Lord Young was alone in holding that the law agent was liable. Lords Mure, Shand, and Rutherford Clark held that the trustees were liable. The Lord President, the Lord Justice-Clerk (Moncreiff), Lord Young, and Lord Adam held that the trustees were not liable. On appeal, the House of Lords have affirmed the finding of the majority, that the law agent is not liable; but have reversed on the question of the trustees, holding with Lords Mure, Shand, and Rutherford Clark that the trustees are liable. There can be no doubt that upon the facts of the case this judgment is in accordance with the great weight of legal authority. But had the question been open, there would have been much to be said for the view taken by the Lord President and those who agreed with

him. The Lord President based his opinion upon two grounds. According to Lord Stair, the diligence exacted from a mandatory as being a gratuitous agent must be in accordance with the mandatory's capacities. One has no business to appoint a slow man his mandatory, and then to hold him liable because he has not been smart. Applying this test to the present case, it appeared that Mr. Meek was a man unacquainted with business and of no very high intelligence, who was hardly competent to judge of the suitability of an investment, and left himself completely in the law agent's hands. He acted certainly with great simplicity, but then he was a simple man, and the truster who appointed him knew that, and his representatives must take the consequences of the simpleton's having been true to his simplicity. There can be no doubt that this argument has inherent justice on its side. But, on the other hand, as Lord Shand pointed out, it involves a principle which if applied in one case must be applied in all, and which, nevertheless, could not be generally applied with precision or without vast inconvenience. "Yes, it was very stupid; but I am a stupid man, and if you wanted to avoid stupid administration you ought to have appointed somebody else trustee," is a plea which, however reasonable in a particular case, would, if sustained, open up all sorts of curious and perplexing inquiries, and really sweep away the rules and sanctions which have gathered round trust administration. The other ground of the President's opinion was a very wide and general clause of indemnity in the trust-deed, exonerating the trustees from the results of omissions and commissions on their part, and from the insufficiency of their investments. The cases, however, are too hard for this opinion. We hold indeed that if a clause of indemnity such as this deed contained were read either literally or reasonably, it covers such a mistake as the trustees here were guilty of. Any man of ordinary intelligence, but ignorant of legal decision, reading the clause would have so interpreted it. But a long course of decisions has established that such clauses give no relief against imprudent and improper investments, however *bona fide* these may be. We hardly sympathize with these decisions. It is all very well to talk of protecting other people's money from acts of improvidence, but when a truster has said, "You

shall be my trustee, but you shall not be liable for so and so," why should the law step in and say, "Yes, you are his trustee, but you shall just be liable for so and so"?

* * *

Income Tax for Foreign Business.—Under Schedule D of the Income Tax Act of 1853, income tax is payable—(1) upon the "annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere;" and (2) the "annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any . . . profession, trade, employment, or vocation exercised within the United Kingdom." In the case of *Lloyd v. Inland Revenue*, 1884, 11 R. 687, the First Division of the Court of Session held unanimously that a British subject, ordinarily resident in Italy, where he carried on an Italian business, was liable to income tax on the whole profits of that business, because he had acquired a property in Scotland, and resided there for a few months in autumn. The Court recognised that the case was one of hardship; but, in their view, the language of the statute was inflexible, and left them no alternative. The authority of this decision has now been shaken, if not destroyed, by the judgment of the House of Lords in the case of *Colquhoun v. Brooks*. Brooks resides in England, and he is partner in an Australian firm carrying on trade in the colony. Part of his trade profits were remitted to this country, and on these income tax was admittedly payable, but he objected to pay income tax on his share of the profits which stood at his credit at Melbourne, and was never sent home. The Commissioners of Income Tax decided in his favour. Then a Divisional Court—Stephen and Wills—was divided in opinion, the former favouring the Crown. The Court of Appeal was also divided; the Master of the Rolls and Lord Justice Lopes were against the Crown, whilst Lord Justice Fry took Justice Stephen's view. Finally, the House of Lords (the Lords Chancellor, Herschel, Fitzgerald, and Macnaghten) upheld the majority of the Court below, and decided the case against the

Crown. Lord Esher had taken the bold view that the language of the statute might be plain, but must not prevail, because it is contrary to international polity to tax foreigners and colonists on profits neither earned nor spent in this country. The House of Lords were not so courageous. Lord Herschel, who delivered the leading opinion, founded upon the subsidiary provisions of the Act. His grounds of judgment were—(1) There is no machinery for ascertaining the profits of business carried on without the United Kingdom. (2) The rules for ascertaining the duty payable in the case of partnerships do not apply where, as here, there are partners resident without the United Kingdom, who are clearly exempt. If, then, any part of such profits is to be taxed, a line must be drawn somewhere, and it may as well be drawn at profits remitted home as at partners resident here. (3) One of the regulations deals with an exemption from duty in respect of income from possessions outwith Great Britain, belonging to persons not resident here for six months; from which it may be inferred that, in the view of the Legislature, foreigners were liable only for income from possessions, not for trade profits not remitted here, seeing that there is no exemption provided in the case of trade profits. From these "indications" Lord Herschel deduces that it was not the intention of the Legislature to tax such profits as those of Mr. Brooks. All this seems very like special pleading. But when equity demands that a coach and four shall be driven through an Act of Parliament, it is well to wrap the coach up in a thick cloak of special pleading, in case the unwary spectator should rashly be tempted to imitate the operation on seeing how easily it can be done.



Drunkenness as an Excuse for Crime.—Elizabeth Short gave birth to a child upon 2nd June. On 6th June she was drunk, and she appears to have been drunk every day on to 8th July, when *delirium tremens* supervened. Her husband was away from home. On 11th July the child died of debility and ulceration of the bowels, caused by starvation and neglect. Lord Young, sitting at Glasgow Circuit, refused to allow a charge of culpable homicide laid on these facts to go to the jury. He is reported to have said that—"He must entirely nega-

tive the theory that it was murder or culpable homicide, or any crime punishable by law in that Court, for a woman, or a man either, to take too much whisky, or to get *delirium tremens*, which was insanity. . . He could not say there was crime unless there was intention to injure." With deference, this direction is quite contrary to settled law. As to the *delirium tremens*, that only supervened after the mischief had been done, and other people were looking after the child. But even if that had been the cause of the neglect which occasioned the death, there would have been much to be said for the view, that although insanity, brought on by excess, excuses overt acts of crime, it does not excuse failure to perform a duty clearly foreseen before the indulgence in excess. A ship captain is not criminally responsible if in a fit of *delirium tremens* he throws the cabin boy into the waves; but does it follow that he is not criminally responsible if he drinks himself mad, and his incapacity to perform his duties leads to loss of life? However this may be, Lord Young was clearly wrong when he went further, and said that to take too much whisky, and in consequence so to fail in duty as to cause the death of another, is not a crime. It is trite law that drunkenness does not excuse crime. A mother gets drunk, and overlies her child. It has again and again been held that this is a crime. A pointsman gets drunk, and causes a collision and loss of life. This, again, is clearly a crime. Can it be said that the conduct of a mother who deliberately, day after day, drinks herself past all sense and feeling, and so starves her child to death, is less criminal than that either of the mother who overlies her babe, or of the pointsman who draws the wrong lever? And then as to the intention to injure, this would remove two-thirds of the cases of culpable homicide from the category of crime.

Special Articles.

THE CROWN LANDS AND THE CIVIL LIST.

IN view of recent proceedings in Parliament, it may not be uninteresting briefly to sketch the history of the Crown Lands in England and the Civil List. The history of the Crown Lands does not, as Mr. Bradlaugh ignorantly alleged, begin with the reign of William IV., but reaches back to the very dawn of history. After the final conquest of England by the Anglo-Saxons, a great part of the land of the country was granted out by allotment, or by grants made by the petty kings, either to groups of one hundred warriors and their chief, or to private individuals. The land so granted was termed the Bocland, in contradistinction to the Folcland or common land of the people, which had not been granted out or appropriated to any private purpose. This latter land could not in early times be granted out to any subject without the consent of the Witenagemot. But gradually as the power of the Crown increased, the consent of the Great Council of the nation became matter of less importance; and with the autocracy of the early Norman kings, the last remnants of restraint upon the Royal prerogative in the matter disappeared, and Folcland was freely granted out by the monarchs to their favourites. With this change the conception, and even the name, of the unappropriated land of the country, as the common property of the people, disappeared. Folcland became *Terra Regis*. Such was the state of matters when feudalism asserted its sway; and naturally a system which treated all land as held from the Sovereign, was in full harmony with the tendency to make absolute the proprietary rights of the Crown in land which had never been appropriated to any subject. There can be no doubt that for several centuries the *terra regis*, recruited at times by forfeitures and escheats, was dealt with by each Sovereign as absolutely his private property. This *terra regis*, so originating and so recruited, became the Crown Lands of modern days.

By the time of the Tudors, the Crown had come to surrender the management and control of the Crown Lands

to ministers or officers of State. Parliament, too, was in use at the commencement of each reign to make a vote of the hereditary revenues to the Sovereign. These revenues included the rents of the Crown Lands. It would be rash to conclude, however, that because Parliament formerly voted these rents, the right of the Crown in them had come to be seriously questioned. Constitutional lawyers are unanimous in holding that this grant by Parliament was only a matter of form, a corollary to the recognition of the Sovereign, or that if it were meant for more, it was a usurpation by Parliament of a power which it did not possess. Parliament could not apply the revenues of the Crown Lands to any other purpose, or restrain the king from ingathering and using them. There can be no doubt, however, that as tension between the Crown and Parliament increased, the latter did assert more and more a right, not indeed to withhold the hereditary revenues from the Sovereign, but to control him in the way in which he dealt with his Crown Lands. King Charles I. alienated many of these lands. The Long Parliament followed suit, and sold nearly all the Crown Estates in order to pay the expenses of the rebel army. At the Restoration, however, the action of the Long Parliament was challenged; and all alienations of Crown Lands made by that Parliament were set aside, and the lands reverted to the Crown. But King Charles II. made a very sorry use of the patrimony so restored to him, and during his reign much of the Crown property was lost to the nation. King William was quite as improvident in his virtue as was King Charles in his vice; and on the accession of Queen Anne, the Crown estates were reduced to so sorry a remnant, that an Act of Parliament was passed prohibiting all further alienations by the Sovereign. A similar statute had been passed for Scotland in 1455. Certain additions to the lands were subsequently made through the forfeitures and attainders of the Jacobite rebellions.

During the reigns of the later Stuarts, there was a constant conflict between Parliament and the Crown as to the application of money voted by Parliament for public purposes. Parliament claimed the right to appropriate grants for special purposes. Charles I. and Charles II. both recognised this

right until they got the money, and both set it at naught so soon as the money was in their hands. It was this conflict which led to the separation of the King's Civil List, after the Revolution, from the naval and military expenditure. It became customary for Parliament at the commencement of each reign to vote to the Sovereign the hereditary revenues and certain specific taxes. The sum so voted was appropriated to the maintenance of the Royal dignity and the household, and to the payment of the pensions and salaries of the then somewhat meagre civil establishment of the country, including judges and ambassadors. The only change of importance down to the reign of King William IV. was effected when King George III. surrendered to Parliament the hereditary revenues, including the rents of the Crown Lands, for a certain fixed sum. Gradually, however, from time to time during the reigns of the four Georges, the Civil List was relieved of various payments, as Parliament came to make separate and direct provision for the civil establishment of the country. Besides the enjoyment of the Civil List, the Georges found in Parliament an unfailing source of supply for the payment of debts. During the reign of George III., debts to an amount of no less than £3,398,000 were paid off by Parliament. The Sovereign had besides all this certain sources of income which were not under the control of Parliament, including the revenues of the Duchies of Lancaster and Cornwall.

An entirely new departure was made under King William IV. The whole of the civil administrative charges were removed from the Civil List, although a pension list of £75,000 was retained upon it. The king surrendered to the State the whole of his revenues, and in return he received a fixed sum of £510,000 as his Civil List. A similar arrangement was made when Queen Victoria succeeded, but the amount was reduced to £385,000, the pensions which had to come off the total being, however, at the same time reduced from £75,000 to £1200 per annum.

Such is the history of the Crown Lands and of the Civil List, and on the demise of the Crown, it is clear that the lands will revert to the next Sovereign, to whom it will be open to make an arrangement or not with Parliament for a

new Civil List. It is quite clear that Parliament cannot compel the next Sovereign by any constitutional process to surrender the Crown Lands. They are as much his property *quâ* Sovereign, as a private person's lands are his property *quâ* individual. The Act of King William IV. explicitly recognised this. No doubt it is only as Sovereign that he can hold them; and if he ceases to be Sovereign, he ceases to have any right in them. His position is not dissimilar to that of an entailed proprietor. He cannot alienate or bequeath them, and if he abdicates, he forfeits them; just as an entailed proprietor whose entail requires him to bear the name of Smith, forfeits his estate if he insists on calling himself Brown.

It may well be matter for serious consideration by the next Sovereign whether he ought to surrender his Crown Lands. These lands yield at present a revenue of about £405,000, so that there is no financial gain in accepting such a Civil List as the present Sovereign enjoys. No doubt it will come to much the same to the taxpayer whether he gets the Crown rents and pays the Sovereign an annual sum, or allows the Sovereign to draw the rents himself. But the public are swayed largely by sentimental considerations. It is not the amount which he has to pay to royalty that troubles the free and independent; he cannot resist the stern logic of the arithmetic which shows him that his share of the burden is infinitesimal. No, it is not the amount that sticks in his gizzard; it is the idea of having to pay at all that troubles him. That he, the free and independent, should have to pay anything to anybody who does not hand him something over the counter for it, is well nigh intolerable. Is it not just possible that the nightmare of this degrading idea might be removed from the good man's mind, if instead of asking for anything from Parliament, the Sovereign was content to keep his own lands?

*"DILIGENCE," OR EXECUTION FOR CIVIL DEBT
IN SCOTLAND.*

DILIGENCE is the word used in our legal language to denote any of the means by which rights are enforced, after they have been ascertained in the mode in which the State has provided that they shall be ascertained in case of dispute; or to denote any of the means by which precautions are taken to ensure the enforcement of rights. In shorter language, diligence is the means by which the power of the Crown is exercised for the purpose of enforcing its decrees against its subjects. In the words of Ross in his lectures, "The writs sued out in England to compel obedience to the law are termed writs of execution, in Scotland they go by the name of diligences."

Diligences are of various kinds, some for one kind of property and some for another: some such as can be enforced only by a particular kind of creditor, and some by any creditor; some such as may be employed before decree, to ensure the enforcement of the decree when obtained, and some such as can be enforced only after decree has been obtained. I propose briefly to state the different remedies which the law of Scotland allows to a judgment creditor for the collection of his debt. If many of my propositions appear somewhat trite to Scottish lawyers, they will remember that the *Journal* is read in other lands, by men unversed in the technicalities of our system of law.

I. The most common diligences are—(1) poinding, and (2) arrestment, which is completed by furthcoming; both are diligences against moveables, can be put in force by any creditor against any debtor, and require less formality than is necessary in most other diligences.

II. Then there are diligences which can be put in force if the debtor is possessed of heritable estate; and of these the ones available for any creditor are adjudication in execution, and inhibition against the heritable estate.

III. There are also diligences which can only be used by certain creditors, and of these there are—(1) Those that can be used by the Crown. These, formerly, in the form of writ

of extent, and others, were of a very special nature ; but now, by 19 and 20 Vict. c. 56, they are of an entirely similar nature to those used by private individuals, except that the Crown is given certain facilities for putting these diligences in force.

(2) There are several diligences which are proper to heritable creditors, and to them alone, and these are—(a) adjudication in implement, which is a means by which a personal obligation to convey heritage may be enforced ; (b) action of mails and duties, by which heritable creditors are enabled to uplift the rents of the lands in payment of the sums due to them, or those who hold a personal right to the lands may attach the rents ; (c) poinding of the ground, whereby a heritable creditor may poind the goods on the ground, both the goods belonging to the proprietor himself, and also those belonging to the tenants to the extent of their rents. (3) Then there are diligences which can be enforced by landlords only, and these are sequestration for rent and ejection.

IV. Lastly, there are diligences which can be put in force when the others have failed, or there is fear of their failing, and these are—(1) imprisonment, which can now be enforced only in a few cases ; (2) sequestration ; and (3) *cessio bonorum*.

Some of the diligences here mentioned are usually termed actions, since the forms which have to be gone through, in order to put them in force, are actions in the first instance ; but I have classed them amongst diligences, since, when the actions which must precede them have been brought, they supply a means by which rights are enforced after they have been ascertained in the mode in which the State has provided that they shall be ascertained.

I shall now proceed to say something of the way in which these various diligences are put in force, as they all require warrants from the authority to which the Crown has delegated the power of granting such warrants.

I. The diligences of poinding and arrestment, which, as being against moveables, I have declared to be the most common, used formerly to require letters of horning and poinding ; and these letters were obtained by a bill in the form of a petition to the Bill Chamber for the letters, and this bill had to come before the judge in the Bill Chamber.

In 1838, by the Personal Diligence Act, 1 and 2 Vict. c. 114, though the old forms were left competent, simpler and cheaper forms were introduced; and these have in consequence nearly superseded the old forms. By this Personal Diligence Act it is laid down (sect. 1), that when an extract shall be issued of a decree, the Extractor shall—in terms of Schedule No. 1 annexed to the Act, the form of which has, however, been altered by A.S. of 24th December 1838 and 8th January 1881—insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge under the pain of poinding and imprisonment, and to arrest and poind after their expiry, and for that purpose to open shut and lockfast places; for which extract no higher fees shall be exigible.

But the extract of a decree cannot be obtained until nine free days (*i.e.* ten days as usually counted) have elapsed from its date, as such time is allowed for what is termed reading in the minute-book, in which book all decrees have to be inserted (Mackay, i. 611; Beveridge, *Forms of Process*, p. 272). This reading of decrees in the minute-book may be dispensed with by the Inner House, but not by a Lord Ordinary; so application must be made to the Inner House, if it is wished that the reading in the minute-book of a decree of a Lord Ordinary should be dispensed with. Accordingly these nine or ten days must, in the ordinary case, elapse from the date of a decree before any diligence can be used on it.

Since the passing of this Act, then, all extracts of decrees have contained a warrant to messengers-at-arms to arrest and poind, so that these diligences can now be put in force without any application to the Court after obtaining the decree.

The warrant annexed to the extract-decree gives power to a messenger-at-arms at once to arrest what is due to the pursuer, by serving upon those indebted to him a schedule in the following terms:—"I, A. D., messenger-at-arms, by virtue of an extract-decree, obtained before the Lords of Council and Session, upon the day of , and warrant of the said Lords thereon, extracted the day of , both in the year Eighteen hundred and , at the instance of

A. B. [design him], pursuer against C. D. [design him], defender, in Her Majesty's name and authority, lawfully fence and arrest in the hands of you, E. F. [design him], the sum of [in words] pounds sterling, more or less, due and indebted by you to the said C. D., or to any other person or persons for his use and behoof, by bond, bill, decreet, tack, ticket, accompt, word, writ, promise, contract, agreement, or by any manner of way whatsoever: Together, also, with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in your hands, custody, and keeping, pertaining and belonging to the said C. D., all to remain in your hands under sure fence and arrestment at the instance of the said pursuer, aye and until he be completely satisfied and paid of the sum of [in words] sterling, with the sum of [in words] of expenses of process, and [in words] as the dues of extracting the said decree conform to said extract and warrant. This I do upon the day of , Eighteen hundred and years, before and in presence of D. M., resider in E., witness to the premises.

"A. D."

It will be seen that this forbids the person upon whom it is served, called the arrestee, to make payment, until the arrester has been paid his debt, to the person against whom the diligence is directed, called the common debtor, of whatever he may be owing to the common debtor; and then this diligence may be followed by an action of furthcoming, by which the user of the diligence, called the arrester, may, to the extent of his debt, get payment of what is owing by the arrestee to the common debtor (Mackay's Practice, p. 101).

It is also competent to arrest in security what is due to the debtor by inserting, in Court of Session summonses, a warrant to arrest (1 and 2 Vict. c. 114, sects. 16 and 17), or by inserting such a warrant in the will of an inferior Court petition.

The warrant annexed to the extract-decree also gives power to poind, but only if the charge is not obeyed, so the diligence of poinding cannot be put into execution until after the days of charge have expired; and these days of charge are fifteen days, if within Scotland, and, if furth thereof, twenty-

one days. The days of *induciæ* have not in the ordinary case been shortened by the Court of Session Act of 1868; for though by sect. 14, letters passing Her Majesty's Signet can proceed on seven days' *induciæ* or warning, and edictal charges upon decrees against one whose abode cannot be found in Scotland on fourteen days' warning or *induciæ*, as decrees do not pass the Signet, the warning or *induciæ* for them has not been shortened as regards those whose dwelling-place is found within Scotland, and so remains fifteen days, while the warning or *induciæ* of edictal charges upon decrees for those whose dwelling-place cannot be found within Scotland has been shortened to fourteen days. To avoid this incongruity of a day more being allowed to those within Scotland to obey the decree, the practice in the Extractor's office still is to insert twenty-one days as the days of charge against parties furth of Scotland (Mackay's Practice, p. 607 (b)).

When the extract is obtained, a messenger-at-arms can at once execute the charge by serving the extract on the debtor, and returning an execution of charge in terms of Schedule No. 2 annexed to the Act 1 and 2 Vict. c. 114. Thus it appears that twenty-five days from its date must elapse before a charge on a decree of the Court of Session can expire, ten days for the reading in the minute-book, and fifteen for the days of charge.

Decrees of the Sheriff can also be executed in like manner, according to the regulations of 1 and 2 Vict. c. 114, sect. 9, and A. S., 8th January 1881. There are also particular regulations for the time at which extracts can be obtained, and the days of charge which must elapse before diligence can be used, and these will be found in Dove Wilson's Sheriff Court Practice, p. 329.

On the expiration of the charge the officer can by virtue of the warrant in the decree at once poind the moveable effects of the debtor, by which the moveables in the debtor's own possession are made available for payment. He executes the poinding by going along with two persons, who are to act as valuers, and who, by sect. 25 of 1 and 2 Vict. c. 114, may also act as witnesses, to the debtor's dwelling-house or other place where the goods are situated; he then proceeds

to make a schedule of the goods pointed, and of their value as fixed by the valutors under an oath which he administers to them. The officer then, after offering back the goods to the debtor or any one in his name who will pay the debt, adjudges the pointing to be completed, and the goods to belong to the creditor (Menzies, Lectures, p. 307). By sect. 24 of 1 and 2 Vict. c. 114, the officer shall leave the goods in the possession of the person with whom they were when pointed; and he shall deliver a schedule specifying the pointed effects, and at whose instance they were pointed and the value thereof, a form of which schedule will be found at p. 237 of Campbell on Citation and Diligence. By sect. 25 the officer shall, within eight days, report the execution of the pointing to the Sheriff, and specify in it the diligence under which the pointing is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were pointed, the value thereof, the names and designations of the valutors, and the person in whose hands the effects were left, a form for which is given at p. 238 of Campbell on Citation.

The Sheriff can then by sect. 26 give orders for the sale of any of the pointed goods that he may consider perishable; and he shall, if required, grant warrant to sell the goods by public roup, at such time, and at such place, and with such public notice as may seem expedient, and at sight of a judge of the roup named; which sale is to take place not less than eight nor more than twenty days after the notice of sale.

By sect. 27 the goods are to be put up at the valued price and sold; or, if they do not realize that price, they are to be delivered to the pointing creditor. By sect. 28, within eight days after the sale, the judge of the roup shall make a report to the Sheriff, and lodge with the Sheriff-Clerk the sum realized by the sale, which the Sheriff may order to be paid to the pointing creditor. By sect. 30 if any person shall intromit with or carry off the pointed effects, he will be liable, on complaint to the Sheriff of the county, to be imprisoned until he restore the effects or pay double the appraised value.

As has been said, these diligences of pointing and arrestment are the most common, since they may be used by any

creditor, and are diligences against moveables, which are more easy to attack than heritable property.

II. If the debtor is possessed of heritable property, this may be attached by adjudication or inhibition. The diligence of adjudication is not a summary diligence, but is put in force by a regular action raised in the Court of Session under the provisions of the Act 1672, c. 19 (2 Mackay, p. 328), by which action lands can be made over to a creditor in satisfaction of his debt, but they can be redeemed by the debtor on paying the debt at any time before a declaration of Expiry of the Legal has been brought and passed, the Legal being a term of ten years after the adjudication, at the end of which this declarator may be brought.

According to Erskine (Inst. ii. 2. 2), inhibition is a personal diligence, which passes by letters issuing from the Signet, prohibiting the party inhibited to contract any debt, or grant any deed by which any part of his lands may be carried off to the prejudice of the creditor inhibiting. The old form of letters of inhibition in use prior to 1868 is still competent, but a shorter form was provided by the Consolidation Act (31 and 32 Vict., c. 101, sch. 22); and by A. S. of 18th November 1871, it is decreed that the mode of obtaining warrant for signeting letters of inhibition is "by production of a *fiat ut petitur*, duly obtained in the Bill Chamber on a bill, presented along with a proper ground of debt, or along with a depending summons on which inhibition has been raised," so if this form is used, it is necessary that a bill be presented in the Bill Chamber to have a *fiat ut petitur* annexed to it.

But by the Court of Session Act, 31 and 32 Vict. c. 100, sect. 18, inhibition on the dependence may now proceed on a warrant in the form given in this section of the Act contained in the will of a summons, and it may be executed at the same time as the summons or at any time thereafter, by which it seems that it is meant that the execution of the service of the inhibition may be returned at any time thereafter. The registration of the summons with the warrant of inhibition and its execution makes this diligence effectual from the date of registration, or the effect of the diligence may be carried back twenty-one days if a notice of inhibition

has been registered according to the provisions of 31 and 32 Vict. c. 101, sect. 155.

III. We next come to the peculiar diligences which can only be used by certain creditors. (1) Those that can be used by the Crown. These used to be of an entirely different nature from the diligences used by subjects, but by the Court of Exchequer Act, 19 and 20 Vict. c. 56, the diligences used by the Crown are made similar to those used by subjects, except that the Crown is given facilities for putting them in force; for, by sect. 28, Crown decrees shall be extracted without abiding the expiration of the days of the minute-book, and the Extractor shall give all extracts in Exchequer causes preference and priority in the preparation thereof over all other business in his office, and the warrant to be annexed to Crown extract-decrees is to be in the form of schedule G. Then, by sect. 30, on arrestment of debts due to a Crown debtor, the trustee shall be in safety to pay the sum arrested without abiding the institution of any process of furthcoming, which will only be necessary if the arrestee does not make payment. Then, also, by sects. 38 and 39 all bonds taken to Her Majesty, though not having a clause of registration, may be registered for execution. (2) There are several diligences proper to heritable creditors, namely—(a) Adjudication in implement, which is a means by which a personal obligation to convey heritage may be enforced. A regular action is required to put this diligence in force, and the procedure in this action will be found in 2 Mackay, p. 345 *et seq.* (b) Action of maills and duties, which, though called an action and requiring a peculiar form of action, is also a diligence. The persons who have a title to sue are superiors, proprietors of land, whether their feudal title is complete or not, liferenters, voluntary or judicial trustees, adjudgers, and heritable creditors. This diligence attaches rents due to the debtor in the hands of his tenants. The procedure in it is given in 2 Mackay, p. 308. (c) Poinding of the ground. This also is a peculiar form of action, but is a diligence as well. It depends upon the principle, that a *debitum fundi* covers not only the land, but also the moveables on the land as accessories (*Campbell's Trustees v. Paul*, 17th January 1835, 13 S. 237). The grounds of debt, therefore, which warrant an action of poinding of the

ground are a *debitum fundi*, as feu-duties, a heritable bond, an annuity secured over lands, or a real burden created by a disposition or other deed; but this diligence is not competent to proprietors, who possess only as adjudgers, life-renters, or real creditors. The procedure for this action or diligence will be found in 2 Mackay, p. 313. (3) Diligences which can be put in force by landlords, which are—(a) Sequestrations for rent, by which, under his hypothec, a landlord can attach a tenant's moveables on the land for payment of his rent, if the action is brought within three months from the term at which the rent was due. This diligence used to extend to all leases of land, but now by the Hypothec Abolition Act, 1880, there is no hypothec for the rent of any land (including the rent of any buildings thereon) which exceeds two acres in extent, and has been let for agriculture or pasture subsequent to November 1880. This is a diligence which is put in force only by the Sheriff Court. It commences by a petition; and, on its being presented, the Court sequestrates and grants warrant to inventory at once, unless a caveat has been lodged or an interdict obtained. The defender can then, if he opposes, enter appearance in the usual way, and a record can be made up in common form. If the petition is not successfully opposed, a warrant to sell is granted, which is carried out by public roup (Dove Wilson, Sheriff Court Practice, p. 492). (b) Removings and ejections. Removings are either solemn or summary, and of these there are, again, different kinds (Dove Wilson, p. 481 *et seq.*); and when decrees in these actions have been obtained, they are carried out by warrants of ejection, which are in some cases appended to the extract, and in others can be obtained by petition to the Sheriff Court (Dove Wilson, p. 491).

IV. I now come, lastly, to the diligences which can be put in force when the others have failed, or there is a likelihood of their doing so. (1) Imprisonment is now in general incompetent, so that the warrant in the ordinary case contains no mention of that penalty (A. S., 8th January 1881), but in certain excepted cases it is still competent, which are—(a) Taxes, fines, or penalties due to Her Majesty, or rates and assessments lawfully imposed; (b) Sums decerned for

aliment; and (c) Decrees *ad facta præstanda*. Again, by the Act of 1881, the power of imprisonment in these cases is greatly curtailed; for by it there are provisions that no one shall be imprisoned for sums for aliment except on proof of wilful default on application to the Sheriff (sects. 3 and 4), and that no one should be imprisoned for a longer period than six weeks for failure to pay rates. Imprisonment, when allowed, can be put in force after expiry of the days of charge, as provided by sect. 5 of 1 and 2 Vict. c. 114—namely, by registration of the extract of execution of charge in the General Register of Hornings, then by getting a minute to the effect of a schedule endorsed in the extract by a Writer to the Signet, next by presenting the extract, with the execution and certificate of registration and endorsed minute, in the Bill Chamber of the Court of Session, when the clerk writes his deliverance "*fiat ut petitur*;" and it is lawful, in virtue of said extract and deliverance, to search for and apprehend the debtor as if letters of caption had been issued under the Signet according to the old law. Similar procedure must be taken to enforce imprisonment on decrees of the Sheriff Court. (2) Of *cessio bonorum* and sequestration. Imprisonment could and, where now competent, can still be prevented by applying for *cessio bonorum* in any case, or for sequestration, with the concurrence of a single creditor with a debt of not less than £50, or of two creditors whose debts amount to £70, or of any three or more creditors whose debts amount to £100 (sect. 14 of 19 and 20 Vict. c. 79). Creditors can also, on their own initiative, sequester debtors who are notour bankrupt in the sense of sect. 7 of the Bankruptcy Act of 1856 and sect. 6 of the Debtors Act of 1880, and thus secure for themselves a fair share of the property belonging to these debtors. In like manner a creditor of a debtor who is notour bankrupt may apply for decree of *cessio bonorum* against the debtor, in the manner provided by sect. 8 of the Debtors Act of 1880; and by decree of sequestration or *cessio bonorum* being pronounced against a debtor, as is well understood, his whole estate is put in trust for the rateable division of it amongst his creditors according to their claims.

In conclusion, there is annexed a tabular view of the

remedies against the estate or person of the debtor which the law of Scotland allows.

I. Diligences available for all creditors.	(1) Against moveables.	{ (a) Poinding. (b) Arrestment.
	(2) Against heritage.	{ (a) Adjudication in execution. (b) Inhibition.
	(3) Against the general estate of the debtor.	{ (a) Sequestration. (b) <i>Cessio bonorum</i> .
II. Diligences available only for certain creditors or certain debts.	(1) The Crown. (The ordinary diligences with certain facilities).	
	(2) Heritable creditors.	{ (a) Adjudication in implement. (b) Malls and duties. (c) Poinding of the ground.
	(3) The landlord.	{ (a) Sequestration for rent. (b) Ejection.
	(4) Taxes, aliment, and decrees <i>ad factum præstanda</i> .	{ Imprisonment.

THE WRITING ON THE WALL.

I.

THE bell for morning prayers at Miss Oliver's always rang twice. It is an unusual arrangement, but it was Miss Oliver's. She kept a school at St. Andrews for young ladies, and her prayer bell rang every morning at 7.55 and again at 8 o'clock. On the sound of the first bell the pupils were expected to descend to the dining-room, where Miss Oliver greeted them as they entered. The second bell summoned the servants to prayers. It was forbidden to any girl to be in the dining-room before the first bell sounded, for Miss Oliver did not like to be disturbed when busied with her domestic duties, but woe to the girl who was not in her place when the 8 o'clock bell gave tongue.

It was a bright morning in March, and the girls came trooping into the room in response to the first bell. Miss Oliver counted them as they came, and an expression of relief passed over her countenance as Annie Bernard entered; for Annie had actually twice been late within the past fortnight. Sixteen girls had entered the room, but still one was missing, and Miss Oliver looked round with a glance of puzzled surprise, for the defaulter was Mary Sinclair, the model girl of the school and Miss Oliver's special treasure. There was still a minute to run, but it ran without Mary Sinclair, and

Miss Oliver moved majestically to her place at the table just as the second bell sounded forth its peremptory summons. The domestics must have been already marshalled behind the door, so prompt was their response, and in half a minute more all were seated. Miss Oliver opened the book with a troubled air; and then an event happened which was quite without precedent in the establishment. Miss Oliver had never been known, in the recollection of the oldest inmate, to interrupt her conduct of the morning devotions by any mundane remark. Even on that memorable morning when the coffee-pot exploded in the middle of the fourth chapter of Nehemiah, she continued to read with a calm imperturbability, never equalled since the day when Charles Twelfth rebuked his secretary for pausing in his writing when a shell crashed through the roof. There was even a tradition in the household that, when one summer's morning Charlie White, the doctor's son, cleared the room of pupils and maids by dropping a live rat through the open window, Miss Oliver and the rat left alone in the room concluded the family worship with all the usual decorum.

But on this occasion the overwhelming catastrophe implied in a possible delinquency on the part of Mary Sinclair overcame even Miss Oliver, and before she began to read she inquired of the housemaid,—

"Jane, did you call Miss Sinclair?"

"Yes'm."

"She is not ill?"

"No'm; I didn't notice anything."

"Very well."

Prayers then proceeded in the usual manner. Nobody expected the defaulter until they were over, for any girl who happened by any chance to be late, knew that there could be no more horrible aggravation of the offence than to enter the dining-room during the course of the service. In ten minutes the devotions were over, the domestics filed out of the room, and every one there looked to the door to see Mary Sinclair enter, shamefaced and crestfallen. But no Mary Sinclair appeared.

"Shall I run and see what has become of Mary?" asked
1 Stirling.

Ellen was the baby of the school, and had a blunt matter-of-fact sort of manner which seemed to go down strangely with Miss Oliver, so that Ellen was the accepted spokeswoman of the party. But on this occasion Miss Oliver was too seriously disturbed to accept any suggestion, even from Ellen, and she replied with asperity,—

“Wait until you are spoken to, child; I can attend to those matters myself.”

So saying she marched out of the room.

“Well, I never!” exclaimed Annie Bernard, when she was gone. “Won’t Miss Perfect catch it this time.”

“Don’t call names,” said little Ellen tartly. “Perhaps Mary is ill.”

“Ill! not likely; but I daresay she’ll sham now that she is caught sleeping in.”

A chorus of disapproval greeted the remark, for Mary, though a favourite of the Mistress, was popular with her schoolfellows.

Meanwhile Miss Oliver had ascended to Mary Sinclair’s room, where she found her pupil still in bed.

“Mary!”

There was no reply.

“Mary, do you hear me?”

Still no reply, though the regular breathing of the sleeper showed that nothing was wrong.

“Mary, what does this mean?” exclaimed Miss Oliver, as she laid her hands on her pupil’s shoulder and shook her violently. The girl was roused at last; she half opened her eyes and murmured,—

“Is that you, Jane? it seems very early.”

“No, Mary, it is I; wake up this instant.”

“Oh, it’s you, Miss Oliver,” said Mary, rubbing her eyes. “Is something wrong?”

“Yes, Mary, something is very far wrong indeed. Do you know what time it is? do you know that prayers are over?”

“Oh, Miss Oliver, Miss Oliver!” exclaimed the girl, starting up, and the tears springing into her eyes, “don’t tell me that. How could that have happened? Jane never called me.”

“But Jane did call you as usual. See, there is your hot water. I never, never expected this of you, Mary.”

"She never wakened me, I'm sure. Oh, Miss Oliver, you don't think I would be late if I had heard her?"

"No more at present, Mary, no more. I shall speak to Jane. But get up at once now; Jane will bring you some milk and *dry* bread, and you will join us in the school-room *after breakfast*."

Miss Oliver turned to go, but as she moved towards the door the skirt of Mary's dress hanging on the back of the door caught her observant eyes.

"Bless me, Mary, where were you yesterday?"

"Yesterday! I wasn't out yesterday; it was wet, you know."

"Just look at that skirt then, Mary, just look at that skirt. Do you mean to tell me you have gone for two days with your skirt covered with mud in that way? Mary, I am terribly disappointed, woefully disappointed. I had certainly hoped better things of you," said Miss Oliver, as she sailed out of the room.

Miss Oliver inquired of Jane as to whether she had called Miss Sinclair in the usual way. Jane was positive she had done so, and that Miss Sinclair had replied; though, now she thought of it, Miss Sinclair did seem unusually sleepy this morning. Miss Oliver directed the girl to go and get Miss Sinclair's skirt, and brush it before her pupil put it on.

Breakfast was over, and the girls had withdrawn to the school-room. Miss Oliver paused for a moment in the lobby to give some household directions to Jane.

"I can't understand, Jane, neither you, nor I, nor any of the young ladies noticing Miss Sinclair's dress yesterday. Have you brushed it?"

"No'm, it won't brush; and Miss Sinclair has put on her brown dress."

"Won't brush—what do you mean, Jane?"

"Well'm, the skirt is splashing wet, and the mud is quite soft, and won't brush off."

"Jane, this is most extraordinary—bring me the skirt."

The skirt was brought for Miss Oliver's inspection. She found the lower part wringing with wet, and bespattered with soft and apparently fresh mud. She was still examining it, when there was a rattle in the letter-box, as of a letter dropped in by somebody who did not ring.

"What is that, Jane?"

Jane went to the door, and returned with an envelope in her hand addressed "Miss Oliver," and with the word "private" at the corner of the envelope. Miss Oliver opened the envelope, which contained only a half-sheet of paper. There was neither signature, date, nor place, but simply these words, written in a bold masculine hand: "I hate tale-bearing; but when a young lady is seen going home with the milk, it is time the mistress of the house should know."

Miss Oliver read the letter twice, and then folded it and put it in her pocket without remark.

"That will do, Jane. Stay, were all the young ladies' boots brushed last night?"

"No, mum, the night before; none of the young ladies were out yesterday."

"But they were all brushed the night before?"

"Yes, mum; of course—just as usual."

"Very well. You may go now."

The girls had waited half-an-hour in the school-room for Miss Oliver, but she did not appear. Then Ellen Stirling volunteered to go and see what was keeping her. She found her sitting in Mary Sinclair's room, her head buried in her hands, and a pair of wet, mud-bespattered boots on the carpet before her.

(To be continued.)

Correspondence.

PROCEDURE IN PETITIONS IN VACATION.

(To the Editors of the Journal of Jurisprudence.)

SIR,—The indulgence given to applicants to the Court to get procedure advanced in Vacation seems to be unfairly taken advantage of. The amount of such procedure has enormously increased within the last year or two; agents who control the matter finding it more profitable to themselves to carry through petitions in Vacation and so dock counsel of their fees. But the Vacation is not meant for such work. Provision is made to allow of the advance of all urgent matters;

but apart from this the Vacation is meant to be, and ought to be, a season of repose. The practice is not a good one. It disarranges the work of the Clerks of Court, and it places upon judges and upon clerks the burden of carrying through procedure with the details of which they are not *au fait*. The Junior Lord Ordinary and his clerks are necessarily familiar with the practice in the petitions appropriated to him ; but the best men grow rusty when they are out of the groove, and it is most tiresome to an Inner House judge to have to make himself familiar again with petition practice for the sake of his fortnight upon the Bills. Moreover, under this system, two or three different judges have in succession to read up the same petition. If the Lord Ordinary on the Bills attends to all Bill Chamber cases and all other work that will not wait, he does all that can fairly be asked of him, and he ought not to be required to wade through a dozen petitions a day in order that counsel may be defrauded of a few paltry fees.—
I am, etc. C.

Obituary.

THE LATE PROFESSOR SIR JAMES ROBERTON.

By the death of Sir James Robertson, to the details of whose career ample justice has already been done by the daily press, the most noted figure in Western legal circles has disappeared. We say this not only because of the position in his profession which he had attained, but also because of his unique personality. There was no office to which the ambition of a solicitor could aspire which Sir James Robertson did not hold. For nearly a quarter of a century he was the most prominent figure in one of the leading legal offices in the city of Glasgow. For the same period he was Professor of Conveyancing in the university of that city. In his later years he was elected to the formal headship of the profession in Glasgow by becoming Dean of the Faculty of Procurators, and within a few months of his death the honour of knighthood was conferred upon him by the favour of the Crown. Yet it may be safely said that Sir James Robertson will be

remembered not as a distinguished legal practitioner, not as a learned professor, not as a Dean of Faculty, and not as one of the already numerous band of knights of St. Mungo, but as one of the most remarkable conversationalists of his time. For he was in no sense of the word a great lawyer. It is true he had a minute and familiar knowledge of the technical rules of Conveyancing. No man was his superior, and few were his equals, upon the construction of a destination or the completion of the title in feudal and burgage subjects. And for concise, perspicuous expression in deeds of every kind he had a talent and an enthusiasm which at times resembled a monomania. To his unwearied efforts, not only in his class, among the rising generation of lawyers, but also among his own contemporaries and rivals, was due a great reform in the phraseology of wills, contracts of copartnery, contracts of marriage, and, in short, of every deed for which no statutory schedule supplies a form. Some of the more cautious of his followers and brethren in the profession, it is true, distrusted his lead. But undoubtedly he was right in the main; and we do not know of a single instance in which Robertson's "short forms" were subjected to the test of judicial examination and were found wanting. In this, then, he did the profession and the public, too, worthy service, well deserving to be remembered. And he did not certainly hide his light under a bushel. In season and out of season he talked of the rubbishy verbiage with which the ordinary conveyancer was wont to cover up his meaning, and denounced the practice in no measured terms. For Robertson had a passion for pre-lecting; he was never so happy as in his lecture-room at Gilmorehill, or in the centre of some small cluster of admiring students, explaining a destination, or the mode of making up a complicated title, or the neatest and shortest mode of expressing the clauses of a deed. If any man left the Conveyancing class in Glasgow University ignorant of the subject, or of that somewhat limited portion of it to which the Professor devoted his energies, that man must have been inexcusably idle or hopelessly crass. For Robertson had an undoubtedly great faculty for teaching; what he knew he saw clearly, and could as clearly impart. His intellect was exceptionally quick, his memory for minute detail

remarkable, his powers of expression clear and ready. But in his nimbleness lay his weakness. He saw a thing at once, or not at all; he could give expression to it with instant clearness, or not at all. He was brilliant in attack; but easily repulsed. Difficulties soon daunted him; he did not take a masterly grasp of a complicated case or piece of business, wrestle with it, overcome it, bring it to a successful issue. He merely toyed with its fringes; said his say about it clearly, definitely, but often superficially, and then skipped off to something else. Many a piece of business he took up, and commenced with brilliant effort, but dropped and left to other hands to finish. This was his frailty as a lawyer; this it was which induced him—perhaps we might even say compelled him—sometimes to lay aside the most important business in order to write some trifling opinion, or to prepare an examination paper for his class, or to revise a lecture on some such archaic topic as the functions discharged by the attorney and the bailie in the ceremony of giving sasine. His was not a reflective or philosophic mind: of legal principles he knew little; of legal rules he knew much: modifications and qualifications, the appreciation of special circumstances which take a case out of the general rule, all that was entirely out of Sir James Robertson's sphere of thought, and alien to his general attitude of mind. And hence with all his varied experience—for he had a numerous *clientèle*—he was not always a safe and cautious adviser. Fortunately he had for long associated with him capable and hard-working partners, and one or two devoted clerks to whom he handed over all the really arduous work that passed through his busy office. But the throng of clients which beset his chambers rarely went away unsatisfied. It is true that but little of the lengthy interview which he gave to each was devoted to the business in hand. Amidst the flow of Robertson's talk it was no easy matter for the anxious caller to get in a word to explain the object of his visit. He was received with a half absent-minded welcome, was bidden draw in his chair by the fire, and then he had to listen to a long and exasperatingly minute account of the battle of Waterloo, the habits of the early Romans, the genealogy of some old Scottish family, the griefs or follies of another client, or in short anything rather

than the special object of the call. Thus it was that Robertson built up his reputation. Clients marvelled that a man whom they supposed to be over head and ears in the most important business could find time to become so minutely acquainted with topics so remote and recondite; and they were content if they could secure but the fragments of time which a man so versatile was able to spare them. Perhaps this was all part of his method; perhaps he could hardly help it, so overmastering was his love of talk. But certain it is that he succeeded in establishing a reputation, not only among the laymen, but also among the professional men of his native city, which few prophets ever attain to in their own country. His name was in numerous clauses of reference; his aid was invoked on many notable occasions. And yet, although he managed to shun any big disaster (for fortune was kind to him), he accomplished no work which would warrant his inclusion in the ranks of eminent lawyers. Outside Conveyancing as taught in his class, he had no special knowledge and still less interest. But he was straightforward and honourable in his actions; unsparing in his denunciation of conduct which appeared to him mean or unprofessional, helpful to his legal brethren, and eager for reforms of every kind.

We have said that he will be remembered as a conversationalist—perhaps the most noted of his time. And yet he was not one of those who are clever at *repartee*, receptive, able to enter into general conversation on any topic with freedom and ease. It is true he often adapted his conversation to his company; but then he liked to know beforehand who and what his company was to be, and then he was prepared for them. He rarely accepted the topic suggested by some one else; his favourite method was to turn the conversation adroitly on to his own topic, and then he got under way upon it, insisted strenuously on it, enlisted the attention of all within ear-shot, and then how he did talk! No one who heard him can ever forget the eager face, the characteristic gestures, and the unmusical voice (for he had no ear for harmony). As a public speaker he was not successful; he rarely attempted it, but when he did he prepared with care, and in later years always read, but in a nervous,

hesitating way, all he had to say. Most great table-talkers are bad public speakers, and Robertson was no exception to the rule. But the extent and variety of his knowledge on history, for the most part purely personal, and on topography, mostly antiquarian, were marvellous. One always had a lurking suspicion that if the means of checking his information were at hand it would be found, that although encyclopædic in range, it would prove in many points erroneous. But so out of the way were his favourite topics, so swift his action, so entertaining that ceaseless patter, that few thought it worth their while to address themselves to the task of correction. Indeed, a more entertaining companion in train or steamer or holiday tour than Sir James Robertson it would have been hard to find. Even in extreme illness—and for many years he was an ailing man—his vivacity and passion for talk rarely forsook him. To the end he monopolized the conversation of every company in which he found himself. In his private relations his conduct was admirable. A certain peevishness at times was manifest, it is true: he could ill brook to be opposed or thwarted; and perhaps did not always forget the man who did him an ill turn. But, on the whole, he had as few enemies as a man in his profession and with his wretched digestion could expect to have, and far more friends than most. His firm will go on as before, a new Professor of Conveyancing will be found, and a new Dean of Faculty will be elected, but the unique place filled by Sir James Robertson in Glasgow society will not soon be forgotten.

MR. HENRY BUCHAN, S.S.C. (1854), of the firm of Buchan & Buchan, S.S.C., died at Edinburgh, upon 7th August, at the age of sixty-five.

MR. JAMES WEBSTER, a much-esteemed Assistant Clerk of Session, died somewhat suddenly at Edinburgh upon 23rd August. He was for some time clerk to the late Lord Craighill.

Appointment.

MR. R. G. GLENN, Barrister (1867), has been appointed Recorder of Croydon.

The Month.

THE BALLOON AND THE GARDEN-SAUCE.

GUILLE *v.* SWAN (19 Johnson 381.)

[A balloonist, accidentally descending into a vegetable garden, called aloud for help, and a crowd rushed in and trampled and destroyed the growing vegetables. The balloon itself did some damage. *Held*, that he was liable for the entire damage.]

GUILLE was a man of high ambition,
 He looked down on the grovelling crowds;
 Men seemed to him of low condition,
 His head was mainly in the clouds;
 Above the sordid earth high flying
 On wings of fancy and of thought,
 He sought the cloud-land up there lying;
 In fact, he was an aeronaut.

Swan was a different sort of fellow,
 He rarely looked above the ground;
 In products red or green or yellow,
 About twelve inches high, he found
 An interesting occupation,
 With more of profit than of loss;
 A very commonplace vocation,—
 He cultivated "garden-sauce."

Guille one fine summer day ascended
 In Mr. Swan's vicinity,
 But long before his course was ended
 He fell, like bad divinity;
 Like Phaëton's, quite madly banging,
 Sheer from the sky his car came down,
 And o'er the side his body hanging
 Threatened destruction to his crown.

He landed plump in Swan's smart garden,
 The car bumped round with awful din;
 He shrieked for help; not begging pardon
 Two hundred rescuers rushed in.

The peelers stamped upon the onions
And turnips upside down forlorn ;
The mob mixed their unsavoury bunions
With Swan's best article of corn ;

They stubbed their toes in his tomatoes,
Disturbed his peas, tossed beans around ;
They disinterred his new potatoes,
And deep cucumbered all the ground ;
His succulent and tender squashes
They squashed with coarse, unfeeling boots,
And with their clumsy, huge galoches
They trampled all his savoury roots.

They caught the car, and Guille delivered,
Almost defunct and deadly pale ;
But Swan's poor garden patch was shivered
Like Eden by the serpent's trail.
The plaintiff for this strange infraction
Demanded—which Guille disallowed—
Some fifteen dollars for Guille's action
And seventy dollars for the crowd.

Guille pleaded an aversion rooted
To paying such a bill for roots,
And claimed that Swan should be nonsuited
For joining inconsistent suits.
The judges held the consequences
Might naturally have been inferred,
Should it appear the evidence is
That no request had been preferred ;

It was as if he'd sharply beckoned
Unto that curious, gaping throng,
Although of course he had not reckoned
On such a vegetable wrong ;
But here there was an invitation
Expressly given to the crowd
By Guille, when in his desperation
He shrieked for succour, long and loud.

So Guille departed sore in feeling;
 Forced to "come down" he was once more;
 And ne'er again was seen revealing
 His favourite tendency to soar.
 For parachutes the Courts care little,
 Balloonatics no rights enjoy;
 But they will not abate a tittle
 'Gainst those who garden-shoots destroy.

—*Irving Brown in the Green Bag.*

* * *

O'Brien v. Lord Salisbury.—What was the misdirection of which the plaintiff's counsel unanimously complain so seriously as to advise an application for a new trial? We agree that the learned judge said a great deal that was quite beside the issue, and much that was of very little weight for any purpose. But we have failed to discover what he said or omitted to say occasioned, in the words of Order xxxiv., r. 6, "Some substantial wrong or miscarriage." There were only two points for the jury to consider—(1) Was the speech of Lord Salisbury, taken as a whole and properly understood, true in substance and in fact? (2) Was it fair comment? Now, a judge is not bound to leave these questions separately to a jury. In libel particularly, a jury are entitled to give a general verdict. And this is what the judge said: "You have to consider and determine in what sense Lord Salisbury used the words quoted—whether they were justified or in the nature of fair criticism. I think you ought also to bear in mind the very strong things Mr. O'Brien admits he said about people to whom he was politically opposed, and about whom he threw out the most outrageous accusations that can well be imagined, and some of which he admits and now deeply regrets. These really are the substantial questions you have to consider." Then he went on more fully: "People, and especially writers, may continually form too dark a view of a man who is speaking, and may attribute to him opinions he does not entertain, and may criticise his conduct in ways which could not be strictly justified; but if the jury are of opinion that what he has done is not beyond this limit of fair comment—if they think that the other person

has written in such a way as to lay himself open to the remarks made—they may find in favour of the critic as against the person criticised. You will have to consider, first, whether the statement is justified; secondly, whether, if not justified, it nevertheless lies within the limit of a fair comment or criticism. You have been told that Lord Salisbury declared that Mr. O'Brien in distinct words urged upon those whom he addressed that men who took unlet farms should be murdered, robbed, their cattle ill-treated, and so forth. You have been told that that is not a criticism, that it is a statement of fact; and that if you make a statement which is untrue, you must pay for it. I cannot altogether agree, and the reason I cannot agree with it is that it is hardly possible, except under circumstances which do not arise, for a man who is making a speech to a public audience to reduce what he says simply to the form of a dry statement of fact. He never does do it. He, in fact, comments as he goes along in nearly every word that he uses. You must separate in your mind—and it is by no means easy to do it—before you come to determine the question I leave to you, between what is comment and what is statement of facts. Did Lord Salisbury mean to say that Mr. O'Brien exhorted these people to murder land-grabbers, or rob them or shoot their cattle; or did he mean to say the language which he used virtually acted as an exhortation, a thing which might end in these horrible crimes? It is a rule of law that in order to amount to slander an indictable offence must be imputed. You all understand that to incite a person to murder is an indictable offence; consequently, if Lord Salisbury meant to do that, and cannot prove that Mr. O'Brien did incite to murder and to rob, then he must pay damages; but if he meant a less pointed accusation than that, if he did not mean to make that accusation at all, and meant only to censure that which Mr. O'Brien advocated, on the ground that what he suggested very often led to murder and robbery, I do not think the plaintiff has made out his case."

As to the plea of justification, his Lordship said it was not necessary for a defendant to prove every word to be true. "You ought to look at the whole of what was said, and you ought to construe the words upon their plain and ordinary signification, and you ought to consider whether the evidence

shows that they were true in the sense in which they were spoken, and which any person reading the whole thing would naturally and properly attach to them."

It has been held over and over again, that if a right direction is given to a jury, the Court will not look with too critical an eye at other portions of a summing-up which it is suggested may have misled the jury. And although we assent to the remark that the address might well have been less egotistical, or, rather, that all matter personal to the judge might well have been omitted, and that many discursive remarks might have been curtailed, the summing-up appears to us unobjectionable on technical grounds, and we shall be surprised if it is successfully objected to.—*Law Times*.



A Question in Church Law.—The minister of Auchterarder being of unsound mind, the Rev. Charles Short was appointed ordained assistant, under Lord Belhaven's Act, in the church and parish of Auchterarder on 7th May 1878, when two-fifths parts of the whole stipend were assigned to him by the Presbytery of Auchterarder. Mr. Short having been appointed previous to Whitsunday, drew his two-fifths of the whole stipend for crop and year 1878. He died on the 2nd June 1888. His executrix contended that she was entitled to the deceased's share of the stipend for the first half of crop and year 1888 in consequence of his survivance of Whitsunday; while the curator for the minister of the parish maintained that the executrix was only entitled to the stipend for the twenty-six days which intervened between 7th May and 2nd June, the date of the death; or, in the event of her being found entitled to more, that she was bound to pay the expense of supplying the pulpit to Michaelmas 1888. The executrix and curator agreed to submit a joint memorial to Sir Charles Pearson, the Procurator of the Church, and abide by his opinion. The Procurator has returned an opinion in favour of the executrix in the following terms:—

"1. I am of opinion that the executrix is entitled to the full two-fifths of the first half of the stipend for crop and year 1888. I do not think it is a case for apportionment. In providing that the proportion of stipend shall be payable so long

as the assistant shall hold and continue to act in his appointment, and that from the date of recall all right and interest under the deliverance shall cease, it does not appear to me that the Act was intended to make the stipend vest *de die in diem*, or in any other way than at the legal terms. In fixing the 'allowance' at an aliquot part of the stipend, I think the Presbytery must be held to have assigned to the assistant a proportion of the stipend, subject to the legal rules as to vesting the stipend. 2. I can see no ground for subjecting the executrix in liability for the expense of supplying the pulpit during the vacancy or down to Michaelmas 1888, or for any period after her husband's death; and, in my opinion, she is not liable for it. That is a liability incumbent on the minister of the parish, which it would require express words to lay upon the executry estate of the deceased assistant."



The Liability of Company Promoters.—The decision of the House of Lords in *Peek v. Derry* is having a considerable effect already. In *Glasier v. Rolls*, noted by us last week, Mr. Justice Kekewich had held upon the facts that a statement in a prospectus was untrue, and, following the Court of Appeal in *Peek v. Derry*, had decided that a certain person was liable as a promoter, as the information upon which the statement was based was furnished by him. It has now been held by the Court of Appeal (87 L. T. 255), following the decision of the House of Lords, which reversed the decision of the Court of Appeal in *Peek v. Derry*, that the defendant was not liable, as he had not made any representation dishonestly. We believe that, in consequence of the House of Lord's decision, a number of cases against directors or promoters have been settled or withdrawn. *Peek v. Derry* is an instance of what is perhaps not very common at the present time, a triumph of common law over equitable doctrines. We shall not be surprised, however, if there is a reaction occasioned by the mischief which will be likely to accrue in consequence of statements being made in prospectuses which are incorrect, misleading, and untrue, and yet not of such a character that any responsible person can be stigmatized as "fraudulent."—*Law Times*.

The Shooting of an Ex-Judge—Ex-Judge Terry was shot dead at Culthrop, California, upon 14th August. The story of the Sharron and Hill divorce litigation, upon which the quarrel arose, is a remarkable one. The late Senator William Sharon, the millionaire, in 1880 met Sarah Alethea Hill. Four years later she claimed to be his wife by secret marriage, and sued for a divorce, producing a written marriage contract. Mr. Sharon denied that a marriage had taken place, but at first the Courts decided in favour of his opponent, and granted her a divorce with judgment for part of his estate. Mr. Sharon appealed, and the litigation proceeded for years, revealing remarkable schemes for forgery, perjury, and bribery, and accompanied with violent assaults in open Court. Mr. Sharon died while the case was in progress, but finally Sarah was routed, and the pretended marriage agreement was declared to be a forgery. Sarah had meanwhile married Terry, who was one of the last survivors of the disreputable race of shooting lawyers who sprang up about 1849, when the scum of the world poured into the gold State. Justice Field's decision and action in imprisoning Sarah and Terry for contempt, under circumstances detailed in the *Journal* in February last, led to the assault committed by Terry. Deputy-Marshal Nagle was especially detailed some months ago by Attorney-General Miller to act as bodyguard to Justice Field, against whom Terry and his notorious wife uttered dire threats. It is thought that the precious pair joined the Los Angeles train at Fresno, with the knowledge that Justice Field was in one of the coaches. When Terry entered the breakfast-room the woman called Terry's attention to the Judge seated at the table. She whispered to him, and hastily returned to her seat and secured a handbag, which it was afterwards ascertained contained a loaded revolver. The stationmaster, knowing the dangerous character of the pair, went to Terry and said, "Judge Field is here; do you think your wife would be so indiscreet as to cause trouble?" "Why do you ask that question?" was the reply. "Because there must be no disorder here," said the stationmaster. "I don't know," muttered Terry, "there may be trouble." The stationmaster stood by the entrance door to watch his wife, and no sooner was his back turned than Terry arose quickly and struck the venerable

judge on the face. Nagle then drew his revolver, and shot Terry dead. Both Nagle and Justice Field were arrested, but the charge against the latter has been dismissed. Nagle's defence will be that he was acting in the discharge of his official duty to protect Justice Field, and that the shooting of Terry was necessary in order to save Mr. Field's life. Terry's bad character has caused a general feeling that his fate was deserved, and it is believed that Nagle will not be punished.

The shooting of David Terry is regarded by the press as a boon to California; but now Californians say that the end is not yet, as his wife still lives. Justice Field, it will be remembered by some, was the only judge of the American Supreme Court who dissented from the extraordinary decision of that Court in the Oregonian Railway case.



In one of the earliest trials before a coloured jury in Texas, the twelve gentlemen were told by the judge to retire and "find the verdict." They went into the jury-room, whence the opening and shutting of doors, and other sounds of unusual commotion were heard. At last the jury came back into the Court, when the foreman announced: "We hab looked ebery-whar, Jedge, for dat verdict—in de drawers and behind de doors; but it ain't nowhar in dat blessed room."



The Deceased Wife's Sister again.—It has often been remarked that the intelligent foreigner, by an error for which certainly we furnish him with some excuse, believes that Britons spend their time in little else than scheming after marriage with their deceased wife's sister. An American recently wrote on the matter as follows:—"The desire of the Englishman to marry his deceased wife's sister is one of the most curious phenomena of the times. The Deceased Wife's Sister Bill may be said to be his steady occupation. In all his breathing spells from emergencies he turns to that. When he is not being massacred by the South Africans, or slaying Soudanese, or fighting Afghans, or pacifying the Irish, he is looking after the Deceased Wife's Sister Bill. He comes back to it out of all victories and defeats with unwavering pertina-

city and courage. Seeing how attractive such an alliance seems in England, I cannot but inquire why the Englishman does not marry the wife's sister in the first place. Why does he go on marrying the wrong one, and then wait for death and the law to help him?"

* * *

THE "saide Lord God" occurs in the will of the father of English Real Property Law, Sir Thomas Lyttleton: "First I bequeath my soul to Almighty God, Fader, Sonne, and Hollye Ghost . . . and to our most blessed Lady and Virgin Saynt Mary, Moder of our Lord, and Jesu Christ, the only-begotten Sonne of our saide Lord God, the Fader of Heven, and to Saint Christopher, the which our saide Lord God did truste to bere on his shoulders," etc.

* * *

THE Massachusetts Legislature has passed an Act forbidding the docking of horses' tails, and punishing it by fine and imprisonment.

Review.

Bell's Principles of the Law of Scotland. The Ninth Edition. Revised and Enlarged, by WILLIAM GUTHRIE, Esq., Advocate, LL.D. Edinburgh: T. & T. Clark, Publishers.

THIS is the most useful book which the Scottish lawyer possesses. There are many other expositions of our law which surpass Bell's Principles in erudition, in speculative power, and in literary grace, but there is none which contains so complete and exhaustive and yet so concise an embodiment of all the rules of positive law which are generally applicable in practice. Mr. Guthrie has done much good work for the profession, but nothing which can compare with the service he has rendered in keeping this great work up to date, and adapting it to the requirements of present-day practice. The last edition was an immense advance upon its immediate predecessor, embodying an enormous deal of work in English

and recent Scottish case law. The success of that edition may be gauged from the fact, that although the work was one of which a previous edition was in the hands of every lawyer in Scotland, a large impression of the eighth edition has been sold out in some three years. The present edition cannot in the nature of things be such an advance upon its immediate predecessor as was the last; indeed, the last left so little to be desired in the way of completeness, that the present can with advantage embody little more matter than three more years of legislation and decision. One word of criticism, not upon the present edition—that can only be tested by practice—but upon the last. Sometimes a very large number of cases in chronological order were given in one footnote, some of them exactly in point, others bearing only indirectly or by analogy upon the matter in hand. The work would be still more useful if the leading and ruling cases were sometimes more clearly indicated. Another error, and one more easily rectified, was that in the last edition, as those who have used the work most can testify, there were more than the inevitable number of inaccuracies in the citation of cases. We trust the present edition will be found to show an improvement in these respects; but whether or no, the vast assistance which the eighth edition has been to the practitioner, warrants us in recommending the ninth as a work which no lawyer should be without.

English Decisions.

JULY—AUGUST.

(All current English decisions likely to throw light upon any point of Scottish law or practice are here reported.)

SETTLEMENT.—*Construction—Gift of share to husband and wife—Separate shares.*—A testator devised and bequeathed his residuary estate unto W. B., E. B. (his wife), S. R., J. D., G. D. B., Y. C., and C. C. (his wife), to be divided between them share and share alike. The testator died in September 1882. The question arose whether W. B. and E. B., his wife, took one share only of the estate, and Y. C. and C. C. (his wife), one share only, or whether it was divisible into sevenths, and the husbands and wives took separate

shares. *Held* (following *Warrington v. Warrington*, 2 Ha. 54), that the use of one "and" only by the testator in coupling the names together showed that it was his intention that husbands and wives should take separate shares, and that the property was therefore divisible into sevenths. — *Re Dixon; Byram v. Tull*, Ch. Div. (North, J.), 3 July 1889.

COMPANY.—*Debenture Receiver*.—*Held*, that where debenture holders are by the terms of their contract with a company entitled to appoint a receiver, but fail to do so until after an official liquidator has been appointed, the Court have a discretion to refuse to allow the receiver to oust the liquidator.—*Re Henry Pound, Son, & Hutchins Limited*, Ch. Div. (Kay, J.), 8 July 1889.

SHIP.—*Collision—Ships meeting end on—Regulations for Preventing Collisions at Sea, Article 15*.—By Article 15 of the Regulations for Preventing Collisions at Sea: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day each ship sees the masts of the other in a line, or nearly in a line with her own, and by night to cases in which each ship is in such a position as to see both the side lights of the other. It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light is seen ahead, or where both green and red lights are seen anywhere but ahead." In a collision action: *Held*, that this article was applicable when both the side lights of an approaching vessel were seen ahead at such a distance that it then was necessary to act for her, and a vessel is not relieved from obedience to the Article because one of the side lights of the other vessel is momentarily lost sight of.—*The Garonne*, Ct. of App. (Esher, M.R., Cotton and Lindley, L.JJ.), 9 July 1889.

PARENT AND CHILD.—*Custody—Wife's desertion—Divorce—Right of father to custody of infant—Guardianship of Infants Act, 1886, sect. 5*.—In October 1881 the applicant, a domiciled Scotchman, married the respondent, by whom he had a son born in August 1882. In February 1884 the wife wilfully deserted her husband, and refused to resume cohabitation. In November 1884 the wife gave birth to a female child, which, up to the present time, had continued to live with her, the boy living with his father. In October 1886, Kay, J., refused an application by the

father for the custody of the female child on the ground of its tender age, but required the mother to undertake that the father should have access to his infant daughter at all reasonable times. The husband had since obtained from the Scottish Courts a divorce on the ground of his wife's desertion, and he now applied again for the custody of the daughter, who was four and a half years old. The mother applied under the Guardianship of Infants Act, 1886, sect. 5, that the infant might remain in her custody. There was no charge of improper conduct against the husband, nor (except the desertion) against the wife. The Court, without desiring to depart in any way from the rules laid down as to the custody of infants, or the rights of the father with respect to his children, having regard to the welfare of the infant, declined at present to separate it from its mother. The child, however, must be permitted to visit its father for three weeks or so at a time, according to his desire. If influences were brought to bear upon the child to the prejudice of the father, the Court would at once interfere. A further application might be made when the child had attained the age of seven.—*Stel v. Steel*, Ch. Div. (Stirling, J.), 10 July 1889.

SHIP. — *Collision — Crossing ships — Regulations for Preventing Collisions at Sea, Article 18.*—When two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way, and the other to keep her course, the latter is bound to comply with Article 18 of the Regulations as to slackening her speed or stopping and reversing, and, if she does not comply, the onus lies upon her to show that to continue her speed was in fact the best and most seaman-like manœuvre for avoiding a collision. Judgment of the Court of Appeal (59 L. T. Rep. N. S. 289) affirmed.—*The Liverpool, Brazil, and River Plate Steam Navigation Company v. Companhia Bahiana de Navegacio a Vapor.*—*The Memnon*. H. of L., 11 July 1889.

COLLISION.—*Sailing ships—Close-hauled ship—Trade winds—Regulations for Preventing Collisions at Sea, Articles 14 and 22.*—By Article 14 of the Regulations for Preventing Collisions at Sea: "When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. (a) A ship which is running free shall keep out of the way of a ship which is close-hauled." Article 22: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." The custom of sailors to treat sailing ships in the trade winds as close-hauled ships when they are sailing a point or two from being as close-hauled as they can lie, does not affect the legal construction of the Regulations for Preventing Collisions at Sea, and the Court will not exonerate vessels so sailing from duties applicable to sailing ships in other latitudes. *Semble*, a sailing ship is close-hauled within the meaning of Article 14 if she is sailing half a point free of the nearest she can lie to

the wind, but not if she is two points off.—*The Eurl Wemyss*, Ct. of App. (Lord Esher, M.R., Cotton and Lindley, L.JJ.), 11 July 1889.

DESIGN.—*Registration—Identical design—Patents, Designs, and Trade Marks Act, 1883* (46 and 47 Vict. cap. 57, sects. 47 and 90).—An application was made to the Court to expunge a design from the register. The applicant, a dealer in fancy lamp and candle shades, had registered an imitation chrysanthemum as a design in respect of goods contained in Class 5—that is, for paper goods. The respondents, who carried on a similar trade, had registered a substantially identical design in respect of goods comprised in Class 12—that is, goods not included in any other class. They contended that, as their design was registered in respect of a different class of goods, the design was, in respect of those goods, new and original, and therefore validly registered under section 47 of the Act. *Held*, that although no doubt the copyright in the design conferred by the Act was limited to the goods comprised in the class in which the design was registered, yet it was not the intention of the Act that a trader who found a design registered for any particular class of goods should be enabled to take that design and register it as new and original in respect of goods comprised in another class. *Held*, therefore, that the application must be allowed with costs.—*Re Read and Greswell's Design*, Ch. Div. (Chitty, J.), 11 July 1889.

HUSBAND AND WIFE.—*Antenuptial debts of wife—Action against husband after judgment against the separate estate of the wife—Statute of Limitations.*—An action was brought against a husband for the antenuptial debts of his wife. A previous action for the same debts had been brought against the wife subsequent to the marriage, and judgment had been obtained against her separate estate; but it remained unsatisfied, as she had no separate estate. *Held* (1), that this judgment was no bar to the second action; and (2) that under the Statute of Limitations time began to run in favour of the husband from the date of the debt, not the date of the marriage.—*Beck v. Pierce*, Ct. of App. (Esher, M.R., Lindley and Bowen, L.JJ.), 13 July 1889.

CONSPIRACY.—*Combination of shipowners—Restraint of trade.*—The defendants were firms of shipowners trading between China and Europe, and with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs were rival shipowners trading between China and Europe, and were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion sustained damage. *Held* (affirming the judgment of Lord Coleridge, C.J.), that the association was not

unlawful, and that no action for conspiracy was maintainable.—*The Mogul Steamship Company Limited v. M'Gregor, Gow, & Co. and Others*, Ct. of App. (Bowen and Fry, L.JJ.; Lord Esher, M.R., dissenting), 13 July 1889.

COMPANY.—*Directors, appointment of, before registration of Company*.—Article 52 of Table A to the Companies Act, 1862, provides that "The number of directors and the names of the first directors shall be determined by the subscribers of the memorandum of association." *Held*, that it was only after the registration of the Company that the subscribers had the power, under Article 52 of Table A, of determining the number and the names of the first directors, and that consequently an appointment of directors before registration was bad.—*Möller v. Maclean*, Ch. Div. (Kay, J.), 13 July 1889.

HABEAS CORPUS.—*Sufficiency of return*.—In July 1888, Mary Ann Tye was placed by her guardian, her mother, under the care of Dr. Barnardo by a written agreement. On the 14th December the mother revoked the agreement by a letter sent to Dr. Barnardo, and asked the child to be returned to her. A few days later Dr. Barnardo, apprehensive of attempts to interfere with the child, sent her with a lady out of the United Kingdom. A writ of *habeas corpus* directed to Dr. Barnardo for the surrender of the child was sealed on the following 21st January. Dr. Barnardo wrote to the lady, who refused to give him the child, and thereupon he made a return to the writ that in the previous December the child was removed by a lady out of the jurisdiction of the Court; that the lady refused to give up the child; and that the child was not at the date of the issue of the writ, and had not at any time since, been within his power and control. The Division Court having held that the return was insufficient, and that Dr. Barnardo was guilty of contempt, he appealed. A preliminary objection was raised that the appeal, being in a criminal cause or matter, would not lie under section 47 of the Judicature Act. *Held* (1), that the preliminary objection was bad; (2) that the guardian of a child has power at any time to revoke an agreement as to the custody of the child; (3) that the return was insufficient, Dr. Barnardo's inability to give up the child having arisen from his previous illegal act in sending her away against the will of her guardian.—*Reg. v. Barnardo*, Ct. of App. (Esher, M.R., Cotton and Lindley, L.JJ.), 16 July 1889.

DEED.—*Construction—Conveyance of "exclusive use of gateway"*.—By lease and release in 1839, M. and others conveyed to W. a piece of freehold ground with a messuage thereon (adjoining a covered gateway), "together with the exclusive use of the said gateway," giving the dimensions thereof as to length, breadth, and height, which said "piece of ground and premises" were stated to be more particularly delineated and described in the plan thereto coloured pink. "Together with all houses . . . ways . . . yards, privileges, easements . . . and appurtenances to the said messuage

. . . hereditaments, and premises, or any part thereof, belonging." The covered gateway was not coloured on the plan. *Held*, that the conveyance to W. was not merely of a right of way through the covered gateway, but of the gateway itself.—*Reilly v. Booth*, Ch. Div. (Kekewich, J.), 16 July 1889.

COMPANY.—*Winding-up—Public undertaking—Jurisdiction.*—A shareholder presented a petition for the winding-up of a company formed by Act of Parliament for carrying on a public undertaking. There was evidence showing that the works authorized had not been constructed, and that the company had not sufficient funds to carry them out, and it was stated that assets might be obtained in the winding-up by proceedings against certain directors. It was suggested that the Court had no power to order a winding-up, because, as was shown by the case of *Blaker v. Herts and Essex Waterworks Company* (41 Ch. Div. 399), the undertaking was one which could not be sold without the assistance of the Legislature. *Held*, that, even if it were the case that the undertaking could not be sold without the authority of Parliament, yet the winding-up would be for the benefit of persons interested in the company and could be ordered by the Court.—*Re The Barton-upon-Humber and District Water Company*, Ch. Div. (North, J.), 20 July 1889.

MARRIAGE SETTLEMENT.—*Construction—Power to raise certain fund "if there should be not more than two children of the marriage"*—*No children born—Whether fund raisable.*—A marriage settlement contained a provision authorizing and directing the trustees, on the request of the survivor of the husband and wife, to raise, "if there should not be more than two children of the marriage, the sum of £5000, and if there should be more than two, the sum of £3000." There were no children born of the marriage, and the husband survived his wife. It was, however, contended that the event on which the exercise of the power depended had not occurred, inasmuch as there was no express power to raise any sum in the event of there being no children. *Held*, that the power was intended to override the limitation in the settlement; and that the only grammatical and unforced construction was that the expression "not more than two children" extended to the case of there being no children. *Held*, therefore, that the sum of £5000 was raisable.—*Wilkinson v. Thornhill*, Ch. Div. (Chitty, J.) 23 July 1889.

HUSBAND AND WIFE.—*Judicial separation—Legal cruelty—Custody of children.*—The wife petitioned for judicial separation on the ground of cruelty. The principal acts of cruelty actually proved at the trial were committed in the enforcement of marital intercourse contrary to the wife's wishes and to her doctor's recommendations as communicated to the respondent. The Court, with some hesitation, found that the evidence proved just sufficient legal cruelty to warrant a decree, but intimated that it would be prepared to lend a favourable ear to any reasonable application as to the custody of the children. The respondent moved the Court for the custody of

the three eldest children. The Court ordered accordingly, and left the two youngest children in the custody of their mother, each party to have access to the children in the other's custody.—*Overy v. Overy*, P. and D. Div. (Butt, J.), 23 July 1889.

COMPANY.—*Articles of association—Alteration of articles by special resolution—Rights acquired under original articles—Remuneration of Directors—Contract of service for a year—Power to retire within the year—Implied right to proportionate remuneration—Companies Act, 1862, sect. 50.*—By the articles of association of the defendant company it was provided that the remuneration of the directors should be £200 a year. It was also provided that a director might retire upon giving a month's notice of his intention to do so, and that the company might require a director to retire at any time without notice and without assigning any reason. By sect. 50 of the Companies Act, 1862: "Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the table marked A. in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution." Under this section the company by special resolution reduced the remuneration of the directors. One of the directors thereupon gave a month's notice, and retired before he had served for a year. Subsequently he brought an action for salary against the company at the rate of £200 per annum for the time during which he had served. *Held* (reversing the judgment of Stephen, J.), that there was a contract by the company to pay the directors £200 per annum for their services; that the articles of association did not constitute the contract, but only showed its terms; that sect. 50 of the Companies Act, 1862, did not empower a company, by altering its articles of association, to affect contracts entered into under the original articles so far as such contracts had been performed; and that, although the contract of service was for a year, the provisions in the articles enabling a director to retire or to be dismissed necessarily implied that, if either of these cases happened within the year, he should receive proportionate payment.—*Swaby v. Port Darwin Gold Mining Company Limited*, Ct. of App. (Lord Halsbury, L.C., Lord Esher, M.R., and Lindley, L.J.), 24 July 1889.

RAILWAY COMPANY.—*Roadway over bridge—Liability of company to repair—Railway Clauses Consolidation Act, 1845 (8 Vict. cap. 20), sect. 46.*—Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with sect. 46

of the Railway Clauses Consolidation Act, 1845, the railway company are bound to keep in repair the road over the bridge, as well as the bridge itself, although no alteration has been made in the level of the road, and no additional expense caused in its maintenance and repair.—*North Staffordshire Railway Company v. Dale* (8 E. & B. 836) followed. Judgment of the Court of Appeal (59 L. T. Rep. N. S. 193; 20 Q. B. Div. 485) affirmed.—*Lancashire and Yorkshire Railway Company v. Mayor of Bury*, H. of L., 25 July 1889.

STATUTE OF LIMITATIONS.—*Payment of interest—Evidence.*—N., a solicitor, lent money to S., a client, on an equitable mortgage in 1863. In the same year S. mortgaged other property to A., who was also a client of N. N. paid the interest on this latter mortgage up till 1866, and charged S. with it in account, and in 1866 a general account was settled between N. and S. After that time there was no entry relating to S. in N.'s books, and he did not appear to have acted as solicitor for S., but he continued to pay the interest on the mortgage to A. up to his death in 1880. In his private diary there was an entry, dated September 1878, of a payment by S. for interest. *Held*, that, assuming this entry to be admissible in evidence as being against interest, which, *semble*, it was not, it did not amount to evidence sufficient to take either debt out of the Statute of Limitations.—Judgment of the Court of Appeal (55 L. T. Rep. N. S. 194; 33 Ch. Div. 127) affirmed.—*Newbould v. Smith*, H. of L., 26 July 1889.

ACTION FOR DECEIT.—*Company—Prospectus—Misrepresentation—"Capital employed in the business"—Liability of director for statements in prospectus—Promoter.*—In May 1886 a prospectus was issued inviting applications for shares in the company of J. R. & Sons Limited, which was being formed to take over the business of J. R. & Sons. This prospectus contained a statement that "the business at the present time returns a net profit of over 17 per cent. on the capital employed." G. R. was the principal partner in the firm of J. R. & Sons, and was named in the prospectus as one of the directors; but it was stated therein that he would join the board on completion of the purchase. The firm had, on the 1st April 1886, sold the business to the Universal Contract Corporation Limited, and they resold to the proposed new company. G. R. did not see the prospectus which was actually issued, but he saw and corrected two previous drafts. G. R. did not join the board of directors until the 19th August 1886. In an action by an investor against G. R. for deceit and damages, Kekewich, J., *held*, upon the facts, that the statement in the prospectus was untrue, and (following the decision of the Court of Appeal in *Peek v. Derry*, 59 L. T. Rep. N. S. 78; 37 Ch. Div. 541) that G. R. must be held liable as a promoter of the company, as the information upon which the statement was based was furnished by him. After the judgment the House of Lords reversed the decision in *Peek v. Derry*. *Held*, on appeal, that the defender was not liable,

as he had not made any representation dishonestly.—*Glasier v. Rolls*, Ct. of App. (Cotton, Fry, and Lopes, L.JJ.), 26 July 1889.

STAMP ACT, 1820 (33 and 34 Vict. c. 97) sect. 70.—“*Conveyance on sale*”—*Agreement for sale and purchase of a business and goodwill*.—*Held*, that an agreement for the sale and purchase of a business, not being an actual conveyance, did not require an *ad valorem* stamp, as it did not operate as a transfer either legally or equitably of property comprised in it, though it gave a right to the purchaser to demand a conveyance.—*Lewis v. Commissioners of Inland Revenue*, Ct. of App. (Halsbury, L.C., Esher, M.R., Lindley, L.J.), 29 July 1889.

MARINE INSURANCE.—*Mutual Insurance Company—Rules—Damage by “improper navigation.”*—Under the rules of the defendants, a mutual insurance company, the plaintiffs were entitled to protection in respect of damage to goods on board their ship if “caused by the improper navigation” of the ship. A cargo of wheat in the hold of the vessel was damaged during a voyage, through the ceiling of the ship being saturated with creosote, which had leaked from the barrels which had formed part of the cargo on the preceding voyage. *Held* (affirming the decision of Charles, J., reported 22 Q. B. Div. 727), that the damage was not caused by the improper navigation of the ship.—*Canada Shipping Company v. The British Shipowners’ Mutual Protection Association*, Ct. of App. (Lord Esher, M.R., Lindley and Bowen, L.JJ.), 30 July 1889.

VENDOR AND PURCHASER.—*Rescission of contract—Forfeiture of deposit—Defect in title.*—The appellant contracted to purchase certain freehold land from the respondent. The conditions of sale provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions his deposit should be forfeited, and the vendor should be at liberty to resell. The appellant accepted the title, and paid the deposit, and prepared a draft conveyance, but when the time came to complete the purchase he was unable to find the remainder of the purchase money. The respondent therefore rescinded the contract, and retained the deposit as forfeited. Some years afterwards, on a resale to another purchaser, it was held that the respondent’s title was bad, owing to a defect which appeared on the face of the abstract delivered to the appellant. The appellant thereupon brought this action to recover his deposit, on the ground of a common mistake and failure of consideration. *Held*, that he was not entitled to recover.—Judgment of the Court of Appeal (57 L. T. Rep. N. S. 747; 37 Ch. Div. 96) affirmed.—*Soper v. Arnold*, H. of L., 30 July 1889.

PRACTICE.—*Litigant called by opposite party as witness—Right to cross-examine.*—Where one litigant is called as a witness by the opposite party, the latter is not entitled as a right to cross-examine him as a hostile witness; but it is a matter in the discretion of the judge, as in the case of any other witness.—Decision of Best, C.J.,

in *Clarke v. Saffery* (Ry. & Moo. 126) disapproved of.—*Price v. Manning*, Ct. of App. (Cotton, Fry, and Lopes, L.JJ.) 30 July 1889.

LIFE ASSURANCE COMPANY.—*Winding-up petition—Transfer of business—Scheme—Policy-holder—Life Assurance Companies Act, 1870 (33 and 34 Vict. c. 61), sect. 14.*—In August 1887 a petition was presented by a policy-holder for the compulsory winding-up of a life assurance company, which stood over from time to time in order that it might be ascertained whether or not some scheme of arrangement could be adopted. The company was established in 1845 under a deed of settlement which contained no power to transfer the business to another company, although it contained a power enabling a majority of two-thirds of the shareholders to vary and add to its provisions. In 1865 the company had taken over the business of the General Annuity Endowment Association, and given a guarantee for payment of the annuities. A scheme had recently been proposed by the policy-holders for transferring the policies *en bloc* to another company, on certain terms advantageous to the policy-holders, although no provision was proposed to be made for the annuitants. On the petition coming on for hearing, application was made by the directors, at the instance of the policy-holders, for leave to present a petition under sect. 14 of the Life Assurance Companies Act, 1870, to obtain the sanction of the Court to the proposed arrangement, and that in the meantime the hearing of the winding-up petition might again be postponed. About 80 per cent. of the shareholders, and some annuitants and policy-holders, opposed the scheme and supported the petitioner. *Held*, that sect. 14 of the Life Assurance Companies Act, 1870, was not an enabling section, and conferred no power on a life assurance company to transfer its business to another company. *Held*, also, that the annuitants were within the definition of "policy-holder" in sect. 2 of the Act, and that their dissent would, under sect. 14, be fatal to the scheme. *Held*, also, that other objections to the scheme were that part only of the "assurance business" was to be transferred, whereas sect. 14 only contemplated the transfer of the whole of the business; and that fresh contracts were to be entered into with the policy-holders. *Held*, therefore, that for these reasons the proposed scheme was impracticable and impossible, and that, as there appeared to be no sufficient reason for any further delay, the usual winding-up order must be made.—*Re Sovereign Life Assurance Company*, Ch. Div. (Chitty, J.), 30 July 1889.

FRIENDLY SOCIETY.—*Unregistered society—Power under rules for members to nominate persons to receive benefits—Validity of power.*—The object of an unregistered friendly or benefit society was declared by its rules to be to enrol as members of the society post and telegraph officials for the purpose of contributing small sums for the benefit of the widows, orphans, and relatives, or nominees of members of the society, at their death, from whatever cause such death might arise. The members were to consist of two classes—first and second—at their option. Those in the first class had to

pay an entrance fee of 1s., and those in the second class an entrance fee of 6d. The rules also provided that the central secretary should announce as soon as possible all cases of deaths of members to each of the local secretaries, and, immediately after the receipt of an announcement of the death of any member enrolled in the second class, they must collect from every member in both classes (enrolled on or before the date of the death announced) whom they represented a contribution of 1d.; and on receipt of the announcement of the death of a member enrolled in the first class they must collect from every member in both classes (enrolled on or before the date of the death announced) a contribution of 1d., and an additional 4d. from every member enrolled in the first class, and duly remit the amount so collected to the central secretary, less the cost for postage, within seven days from the receipt of the announcement, and the central secretary should, with as little delay as possible, pay the contributions so collected to nominee of the deceased member, less only the actual cost incurred in and about the receipt and the remittance of the money. G. H. was a first class member of the society, and a payment under its rules, amounting to £148, 8s. 1d., was due in respect of his death, which occurred in March 1889. Pursuant to such rules, G. H. had nominated H. H. to receive all benefits that might be due on his behalf from the society after his decease. A dispute arose in regard to such payment. It was claimed by H. H. as the nominee of G. H., and also by A. B. as the administrator of the estate of G. H. On behalf of A. B. it was contended that this being an unregistered society (although not necessarily an illegal society), the powers contained in the Friendly Societies Acts in regard to nominations had no application; and that, at any rate, the present amount was in excess of the limit (£100) authorized by those statutes. This being so, it was contended that the law would only recognise the right of the legal personal representative of the deceased to receive the money; and that the society could not by its rules defeat the right of the Crown to legacy and probate duty. *Held*, that the payment did not come out of the funds of the society, but was a contribution by the members for the benefit of the person nominated by G. H.; and that practically it was equivalent to a contract by A. with B., that B. would, on A.'s death, pay to C. a certain sum of money. *Held*, therefore, that the claim of the nominee, H. H., must prevail.—*Harris v. The United Kingdom Postal and Telegraph Service Benevolent Society*, Ch. Div. (Kay J.), 1 August 1889.

COMPANY.—*Promoters' expenses—Payment out of funds of company in excess of expenses actually incurred—Validity of resolution for payment.*—A motion was made by E., a shareholder in a company, to restrain the company and its directors from applying any part of its capital or moneys in or towards the remuneration of a certain syndicate or other the founders or promoters of the company, and from giving effect to an alleged resolution of the company granting a remuneration to its founders out of its capital. The company

was promoted by the syndicate, and its objects were stated in the memorandum of association to be (amongst others) to carry on the business of coal owners and coal merchants, and to pay out of the funds of the company "all brokerages, commissions, legal and other expenses for the issuing of the capital and in respect of the formation" of the company. The articles of association provided that, "At the first annual general meeting the question of remunerating the founders of the association for their services preliminary to the establishment thereof shall be considered, and the shareholders shall then decide what remuneration (if any) shall be allowed, and also as to whether the same shall be payable in cash or in shares of the association, or partly in cash and partly in shares." A resolution was accordingly passed, "That the remuneration of the founders should be a payment of $2\frac{1}{2}$ per cent. on the nominal capital of the association, payable £5000 in cash and £1250 in shares." A cheque for £5000 was thereupon signed by two of the directors of the company (who were also directors of the syndicate) and handed to the syndicate. E. alleged that that resolution was the result of collusion between some of the directors of the company, who were also directors of the syndicate, and that therefore the payment of £6250 in cash and shares ought not to be allowed. *Held*, that the syndicate had not incurred expenses to that amount; that the clause in the memorandum provided for payment of "expenses" only; and that, as the syndicate had not incurred expenses to the amount voted by the resolution, then, to the extent to which expenses had not been incurred, the amount voted was a present, and a present out of the funds of the company. *Held*, also, that even if the memorandum contained an express clause that the company might make a present of its money to any syndicate or person, it was doubtful whether such a power would be *intra vires*. *Held*, therefore, that there must be an injunction against carrying out the resolution, as asked.—*Everest v. The Metropolitan Coal Consumers' Association Limited*, Ch. Div. (Kay J.), 2 August 1889.

NUISANCE.—Injury to wine cellar—Injunction.—The owners of a London hotel, on rebuilding and enlarging their premises, used a room in the basement as a supplemental kitchen, and placed in it a large closed range or stove, close to the party wall of an adjoining private dwelling-house occupied by R. A small chamber in R.'s house, separated from this kitchen only by the party wall, was used by him as his wine cellar. In consequence of the heat in the kitchen, the temperature of the cellar was so raised as to render it unfit for the storage of wine. The owners of the hotel contended that they had only made a reasonable use of the kitchen for the purposes of the hotel. On R. claiming an injunction to restrain them from using the kitchen so as to cause a nuisance to him, *held*, that the governing principle in cases of nuisance did not depend upon whether the defendant was using his own reasonably or otherwise, but whether he was causing an injury to his neigh-

bour; and that, as the injury was proved, the injunction must be granted, but should not be enforced for three months.—*Reinhardt v. Mentasti*, Ch. Div. (Kekewich, J.), 2 August 1889.

CHARITY.—*Cy près*—*Foreign country*—*Jurisdiction*.—By his will, dated the 23rd November 1885, Abraham Davis bequeathed £1800 to Baron Ferdinand de Rothschild, for the purpose of building a synagogue and school at Jerusalem. Baron Ferdinand de Rothschild disclaimed the trust. The money was insufficient to build a synagogue and school, and, with the consent of the Attorney-General, the committee of a school called “Baron Lionel de Rothschild’s Schools,” which stands ten minutes’ walk from the Jaffa Gate of Jerusalem, presented a petition for payment of the money to them on the *cy près* principle. There was no synagogue attached to the school, but the Jewish service was performed there. The committee consisted of English Jews living in England. *Held*, that, though the money was to be expended in a foreign country, the committee being persons resident in England, the Court had jurisdiction to order the money to be paid to them to be applied to the general purposes of Baron Lionel de Rothschild’s schools. *Attorney-General v. Lepine*, 2 Sw. 181, considered.—*Re A. Davis’s Trusts*, Ch. Div. (Kay, J.), 3 August 1889.

COMPANY.—*Reduction of capital*—*Shareholders*—*Equality*—*Sanction of the Court*—*Ultra vires*—*Companies Act, 1867, 30 and 31 Vict. c. 131, sects. 9 and 11*—*Companies Act, 1877, 40 and 41 Vict. c. 26*.—On the 19th March 1889 a company at a general meeting passed a special resolution reducing the amount of the ordinary shares from £22, 6s. to £20 each fully paid, but leaving 3000 preference shares of £10 each with £1 paid up unreduced. This resolution was confirmed at a general meeting held on the 5th April 1889. Application was now made to the Court for confirmation. *Held*, that the company had no power under the Acts to reduce some of its shares without reducing the others. *Held*, that in such a case the majority could not bind a single dissentient shareholder. *Held*, that, the resolution being *ultra vires*, the petition must be refused.—*Re Barrow Hæmatite Company*, 59 L. T. Rep. N. S. 500, 39 Ch. Div. 582, and *Re Quebrada Railway, etc., Company*, 60 L. T. Rep. N. S. 483, Ch. Div. 363, not followed.—*Re Union Plate Glass Company Limited*, Ch. Div. (Kay, J.), 6 August 1889.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

A Court of Criminal Appeal.—When the past session of Parliament was just expiring, the question of constituting a Court of Appeal in criminal cases was once more raised. The time for reopening the subject was not well chosen. No amount of disclaimer on the part of those who brought it forward could avail to dissociate, in the public mind, the discussion of a grave question from the reprehensible and extravagant “criticism” which followed a recent trial for poisoning. We are far from maintaining that the proceedings of courts of justice ought not to be subjected to the most searching public criticism. All that is intended is, that the case of those who propose a Court of Criminal Appeal was necessarily prejudiced by being pressed at a time when maudlin sympathy and a hysterical dislike of any result that is disagreeable had led a large number of ill-balanced minds to rail at the honest administration of justice. The question, nevertheless, was ably and dispassionately treated in the House of Lords—the fittest of all bodies to deal with such a topic. Lord Fitzgerald brought forward the subject by asking whether the Government would during the recess consider the question of constituting an effective Court of Appeal in criminal cases, and, if expedient, present a Bill on the subject next session. The Lord Chancellor declined to commit either the Government or himself to

any abstract proposition on the subject, and would not at that inopportune time discuss the subject with reference to any future alteration of the law,—and it humbly seems to us that his Lordship was right. The matter, therefore, rests as it was. Meanwhile the authorities are divided. Thus, for example, Lord Esher, Master of the Rolls, writes to the *Times* that he has “the strongest possible opinion that there should be such a Court,” and sets forth the conditions of its constitution. Lord Bramwell, on the other hand, also writes to the *Times* that he has “the strongest possible opinion to the contrary,” and in support of his views refers to an article by Mr. Poland, Q.C., which we print elsewhere. During the discussion, Lord Herschell made much of a theoretical objection. It appears to his Lordship to be indefensible that in civil cases, however small, there should be a right of appeal, but that in criminal cases there should be none. Surely in itself this want of symmetry is no grievance. Provided that the decision of the primary Court is satisfactory, what fault can reasonably be found with the system? Lord Herschell believes that at present wrong convictions seldom occur. He does not, moreover, “share the view . . . that the existence of such a Court (of Appeal) would prevent the occurrence of erroneous convictions.” For our own part, and referring more particularly to Scotland, we are of opinion that a Court of Appeal in criminal cases is not required, and is not desirable. We believe that miscarriages of justice in Scotland are all but entirely in one direction—viz. that of the acquittal of the guilty, and not that of the conviction of the innocent. The royal prerogative is adequate to meet an isolated case to the contrary, should it ever occur. What we do require, and require most urgently, is something even distantly approaching uniformity of sentences on convicts. The present disparity between the sentences imposed by different judges for the same offence is a matter demanding early attention.

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Coroners' Inquests in Scotland.—At the other end of our criminal procedure also, at the initiatory stage of certain inquiries, there is, in the opinion of some, need of reform. In the February number of this magazine we commented on

the proposal sometimes made, that the system of coroners' inquests into all cases of sudden or suspicious death should be introduced into Scotland. One hears of no considerable dissatisfaction with the method at present followed in Scotland. No whispers of the hushing up of suspicious cases reach the public ear—and that may be taken as practically conclusive, in these days of enterprising newspapers. The customary form in which the proposal makes its appearance is that of a stray question shot at a parliamentary candidate. The subject, however, was again raised at the Trades Union Congress in Dundee last month. A resolution was proposed, and unanimously carried, to the effect, that "the law of Scotland ought to be made synonymous with the law of England relative to coroners' inquiries into accidental death." It is to be noted that the proposal was limited to cases of *accidental* death, and that the word *sudden*, which had occurred in previous resolutions of the Congress, was on this occasion omitted. Several speakers commended this omission as wise, one delegate stating, with a charming and refreshing simplicity, that the people of Scotland had a decided objection to coroners' inquiries taking place as regarded deaths which were due to natural causes, and were in favour of these being confined to accidental deaths. Perhaps at a future Congress this gentleman, should he again be deputed to speak for the people of Scotland, will acquaint the world as to who is to be charged with the somewhat responsible duty of deciding whether a case of sudden death is due to natural or to accidental causes, and so portioning out the work for the coroner. Another delegate showed thoroughness, at least. He was for no half measures. When a sudden death happens on board ship, this delegate would have the crew empanelled as a jury. But how, if the entire ship's company do not muster twelve all told? Shall accidents then happen with impunity on such a ship, or shall each ship be bound in future to carry a full jury for all emergencies? We believe we do not misrepresent the drift of the discussion at the Congress when we put it that the delegates after all are quite satisfied with the present system of inquiry in Scotland, except in one class of cases. They trust it fully in the matter of investigating the causes of all sudden and suspicious deaths, in the ordinary sense of these

terms. But they desire reform in the mode of conducting inquiries into what was described as "accidental" deaths,—a phrase which, it would seem, is intended to be limited to deaths of workmen while engaged in their work. Without expressing an opinion on the need of legislation in the matter, we gravely question whether an inquest by a coroner and jury would be the best form of inquiry, or would be a desirable form; and it would be a matter for regret, we think, were the present careful and scrutinizing inquiry by Procurator-Fiscal, Crown Agent, and Crown Counsel, which has worked so well, to be displaced as a whole, because some reform may be necessary in regard to one class of catastrophe.

* * *

Simple Solicitors.—The solicitors of England may well hang their heads and blush this day. If it be objected, in the well-worn threadbare fashion, that as lawyers they have lost the power of blushing, it may be retorted that they must have lost something more than that, for their professional astuteness has surely gone amissing too. It is an occasion for cynics to rejoice. In the sister country, the *habitat* of Messrs. Dodson & Fogg, forsooth, 125 solicitors have been defrauded of various sums of £5 sterling money of this realm and upwards, by a marvellously sharp person (to say the least of him). This crafty artist gave to his helpless and confiding victims certain lists of alleged outstanding claims to collect for him, and on the substantial security of the same he "borrowed" the small but convenient sums mentioned. It were kindest, perhaps, to say nothing of the solicitors' part in the several transactions. We shall merely commend it as honest—"and to be honest as this world goes is to be one man picked out of a thousand." But let us extoll the talents of the other party to the transaction. His genius cannot be called in question; as little can his courage, his audacity, his address. He was a great man who could coolly announce to himself, even in the secret cabinet of his own soul: "I shall defraud—not guileless philanthropists or simple countrymen—but 125 practising attorneys; and that not when in their cups or when genial with holiday, but during their dry and sober business hours, and at their own

accustomed chambers." He was a bold man who could resolutely set about carrying out so daring an enterprise; he was a man of address, of vast capabilities, who could succeed in it; and he possessed no contemptible knowledge of man when he adopted the device of the list of claims. Six score and five! Truly, the cynics will smile.

* * *

Judicial Diversions.—The chosen pursuits of men are many—so a poet told us centuries ago—and the recreations of our judges show the diversity of tastes and talents incident to humanity. Some of the learned Senators of the College of Justice doff their gowns and wigs to don golfing coats and caps, and lay down their quills to take up their irons and putters. Some cross to foreign lands, and found golfing settlements on shores where the pronunciation of the names of the weapons must prove somewhat of a drawback. Others of the Senators follow such standard sports as shooting, fishing, yachting, and the more nondescript pastimes of a country life. There are some, again, who find their pleasure in the fairy tales of science; who climb Ben Nevis to be something nearer the end of the atmosphere, and who can still further enlighten societies already enlightened. In all these cases we have a concrete instance in our mind as we write. And we remember, too, the tastes which distinguished the judges of a by-gone age—ranging from peaceful horticulture to the allied, but different, Bacchanalian festivals. But it has been left for the present Lord Justice-Clerk to strike out a completely new direction for himself. *Bella detestata matribus* are his sport. The learned and versatile Lord Kingsburgh spent his vacation in none of the pastimes to which we have alluded above, but in visiting famous continental battlefields, and in witnessing the manœuvres of the French army and those of their German rivals.

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The Whitechapel Atrocities.—Dr. Forbes Winslow is about to begin, and, like Mr. Snodgrass, he elaborately announces the fact beforehand, so that he may take no one at a disadvantage—no, not even the murderer, on whose tail he is about to put salt. The doctor has got a clue. Having got it, like

the generous man that he is, he does not selfishly keep it to himself. He confides it to the British public, amongst whom, alas! the much-sought-after murderer is still included. This same clue, which the doctor has got (now in common with several millions of newspaper-reading Britons), was, it seems, supplied to the police; but they "chose to ignore it" (in the language of the doctor), which we take to mean that they did not there and then publish far and wide their intentions concerning it. But the doctor (whom some indiscriminating journals describe as "a mad doctor") is wiser and more enthusiastic. We have been all duly informed that he "intends to visit Whitechapel in a few days in disguise, there to pursue his investigations personally with a view to bringing the culprit to justice." So we can keep our eye on him. The enthusiastic doctor would scorn to work in the dark. By-the-way, in the hurry of the moment, he omitted to mention what his disguise is to be. This is an oversight which he will doubtless speedily put right.

* * *

Sunday Shaving.—The Supreme Court of Indiana has decided that shaving on Sunday is unnecessary or is not a necessity—hairsplitters may distinguish between the two phrases if they can. The important point arose in the case of *Ungericht v. The State* (reported in 21 N. E. Rep. 1032). It appears that one John Ungericht, by trade a barber, did on a certain day, which chanced to be Sunday, shave one Jacob C. Juncker for the not exorbitant sum of fifteen cents. Out West they have a statute prohibiting labour "on the first day of the week, commonly called 'Sunday.'" Under this statute Barber Ungericht was convicted before the mayor for shaving Jacob C. Juncker as aforesaid. He appealed to the Criminal Court, but was again convicted. Being a persevering man, the barber appealed to the Supreme Court, but, we regret to say, the conviction remained. The grounds of the charge and conviction are not wanting in quaintness and suggestiveness. Particularly noteworthy is the impressiveness with which the qualities of the shavee are set forth. Much is made of the fact that the stubbly Juncker was over fourteen years of age. This may be for the purpose of getting over

the effect likely to be left by his unfortunate name; but the fact of his being over fourteen seems to be of the essence of the crime. Apparently Juncker's age was not rashly assumed from his possession of a beard. It was regularly proved. Apparently Ungericht may with impunity shave any number of Junckers under fourteen on any day of the week. Then great stress is also laid on the fact that the mischief-making Juncker was "not a traveller, nor a family removing." Now, if he had only taken care to be a family removing, as it appears he might have been out West without creating a sensation, then he would not have got his barber into trouble and disgrace. The Court were of opinion that even if Juncker had Ungericht to shave him the other six days of the week, he ought to shave himself on Sunday mornings. Yet, as we have heard an honest wage-earner complain, of all mornings in the seven that which follows the hilarity of Saturday night is the least suited for an operation requiring more or less steadiness of hand.

* * *

The Lodger Claim Again.—On 23rd August the Attorney-General was asked in the House of Commons whether the lodger franchise was designed to permit sons living with their fathers, and employed in their business, to be registered as parliamentary voters. Sir Richard Webster felt no difficulty in the matter. If a man, he replied, occupies, as a lodger, rooms of sufficient yearly value to entitle him to vote, it is no objection that the rooms happen to be in the father's house, or that he is employed in his father's business. This is, of course, at once the right interpretation of the statute, and the only common-sense footing on which to place the lodger franchise. To adopt the contrary view is to put a premium on forisfiliation. The difficulty they are feeling in England is to discriminate between a son's occupying rooms in his father's house "as a lodger," and his doing so "as a member of the family." At West Ham (North), the other day, the Revising Barrister adopted the rule laid down in the Scottish case of *Brown v. Martin* (13 R. 159). In the list of lodgers there appeared the name of William Nicol M'Gregor, who claimed for four rooms, on the ground

floor of 105 Amity Road, the rental being 9s. 6d. per week, paid to James M'Gregor. The Revising Barrister asked whether it was the case of a father and son, and as neither of the agents could supply the answer, he proceeded to state that the matter had gone through a good deal of discussion, and he mentioned the case of the son of Sir Charles Russell, where last year the vote was disallowed on the ground that the son was living with Sir Charles Russell as a member of the family. He had looked into the matter, and he came to the conclusion that there must be evidence of a tenancy. The only important cases were two Scotch cases. There was *Dickson v. Macdonald* (16 R. 143), where the claimant for several years had occupied two rooms in his father's house of the value of upwards of £10, and had the sole use of them. He paid no rent, but enjoyed the use of the rooms as a gift, and as part of his allowance from his father. Here it was held that the claim was rightly rejected, Lord Mure, Lord Lee, and Lord Kinnear agreeing that there must be a contract. The second case was that of *Brown v. Martin*, the decision of which defined circumstances under which a son living in his father's house was a lodger. Here it was held that sons living in family with their parents and occupying and paying rent for rooms of which they have the exclusive use to the requisite value may be enrolled as lodgers, and the payments made by them may be either in money or money's worth; and that where sons so living with their parents each pay for the exclusive use of a separate bedroom, and jointly of a parlour, their claim to be enrolled as lodgers is not defeated by the fact that the rest of the family take breakfast with them daily in the parlour. The same rule applied although the son paid no money, but worked for his father, and in return got board and lodging and clothing, the lodgings being worth £10 per annum. This contract of tenancy was essential to the validity of the claim. There must be some evidence. The declaration was *prima facie* evidence, but only when there was no suspicion, and in these cases the similarity of name of the claimant and the landlord was a matter of suspicion. The whole of the cases where the landlord's surname was the same as that of the claimant were directed to stand over.

Special Articles.

NOTES UPON I O U's.

General Nature. — Lord President Inglis describes I O U's as documents in which "the writer states in his own handwriting, and under his own signature, that he has received so much money, and gives that document to the lender to hold as his writ. That is held to constitute a loan. Such a document requires no evidence to support or explain it. The words are sufficient, and the Court construes it as not only a receipt of money, but an implied obligation to repay. If it were otherwise, and the money had been received in discharge of a debt, it would have been in a different form, and have borne to have been in payment of such debt, and would have required a stamp. In advances of money it is not uncommon to grant a bill or promissory-note, and that is a good document of debt, but it requires a stamp of a different kind. But simple acknowledgments, or I O U's, are very frequent between parties who do not wish to use a negotiable document, and prefer a more simple way of evidencing the loan; and the Court has very properly given effect to that class of documents. But they are not taken as part of the evidence, but as themselves proving the loan. No doubt you may require to set them up in this sense, that it may be necessary to prove the handwriting, or the fact of delivery; but beyond that parole evidence is utterly incompetent."¹

1. An I O U will be admissible in evidence if it be tested, or if it be holograph of, and signed by, the granter,² or if it be written out and signed by the debtor's authorized agent.³ Parole is admissible to prove the agent's authority.⁴ But while it is quite true that a document signed by the granter, but of which the parts essential to the constitution of an obligation are not written by him, is not holograph,⁵

¹ *Haldane (Speirs' Factor) v. Speirs*, 1872, 10 M. 537.

² *Haldane (Speirs' Factor) v. Speirs*, *supra*; *Smith v. Smith*, 1869, 8 M. 239. As to the effect of unsigned holograph writings where *rei interventus* has followed on them, see *Weir v. Robertson*, 1872, 10 M. 438.

³ *Woodrow & Son v. Wright*, 1861, 24 D. 31.

⁴ *Ib.*

⁵ *Hamilton's Exors. v. Struthers*, 1858, 21 D. 51.

it is to be observed that "there are two exceptions to the general rule that a holograph writing must be entirely in the handwriting of the granter,—First, where the essential parts of the document are in the handwriting of the granter, and merely formal words are in the handwriting of another person; second, where there are in the handwriting of the granter words which clearly express an adoption of what is not in his handwriting."¹ The case in which the principle of the second exception was furthest carried is *Christie's Trustees v. Muirhead*.² In that case a document had been granted in the following terms:—

"79 QUEEN STREET, *March 14/63.*

"I acknowledge having received the sum of fifty pounds sterling from my sister Agnes Muirhead. Should it ever be in my power to repay her this sum, I will do so if required.

"Received the sum of £50 stg.

James Muirhead."

It was proved that the words in italics and the signature were holograph of the granter, and had been added by him to the portion of the writing which was not holograph; and it was held that the words in the granter's handwriting were sufficient to bind him, being explained by the previous words.

In all these cases we have been concerned with a single document. Where, however, the document is one of a series of letters, it cannot be construed by itself, but must be read along with the whole correspondence.³

It is thought that these rules do not apply where the amount in question is less than £100 Scots. They certainly do not apply where the I O U is *in re mercatoria*.⁴ The documents privileged on this ground are enumerated in Dickson on Evidence.⁵

¹ *Maitland's Trustees v. Maitland*, 1871, 10 M. 79, *per* the Lord President; *cp. M'Intyre v. M'Farlane*, March 1, 1821, F.C.; *Bryson v. Crawford*, 1833, 12 S. 39; *Weir v. Robertson*, 1872, 10 M. 438.

² 1870, 8 M. 461.

³ *M'Keen v. Adair*, 1864, 2 M. 392.

⁴ *Smith v. Smith*, 1869, 8 M. 239.

⁵ 3rd ed. sect. 795.

2. A holograph I O U does not prove its own date, except against the person issuing it.¹ In the opinion of Lord President Hope² and Lord Neaves,³ the document is to be read as if it had no date. But in *Waddel v. Waddel's Trustees*⁴ Lord Moncreiff states the law to be as follows:—“Though the deed does not, by itself, prove the date, the rule is not that it is to be taken as if there were no date expressed in it, but only that in cases of any doubt the date must be supported or adminiculated *aliunde* ;” and he quotes Erskine, iii. 2. 22, and the case of *Dow* there cited, in confirmation of his statement. He indicated that the proof in support of the date may be of facts and circumstances. In the older cases⁵ witnesses were received to instruct it. It is not fatal to an I O U that it is antedated through mistake or without fraudulent design.⁶

Where the I O U is *in re mercatoria* it proves its own date,⁷ except where there are averments amounting to an allegation of fraud.⁸

3. We have already seen that, in the case of a holograph I O U, parole is admissible to prove the date, and where an agent has granted the document, his authority. It is also admissible to prove the handwriting or the fact of delivery.⁹ And in questions as to delivery, it is to be observed that the possession of the document is most important; “for the natural extinction of such an acknowledgment is either by re-delivery or cancellation of the document, or by a counter-document granted to discharge or extinguish it.”¹⁰

Thus it has been held in England that an I O U not addressed to any one by name, but signed by the defendant and produced by the plaintiff, is sufficient evidence of an account stated between the parties, unless the defendant can

¹ *Purvis v. Dowie*, 1869, 7 M. 764; *Dyce v. Paterson*, 1847, 9 D. 1141.

² *Suttie v. Rose*, 1838, 16 S. 429.

³ *Purvis v. Dowie*, *supra*.

⁴ 1846, 7 D. 605.

⁵ *Brasdie v. Fairny*, 1665, M. 12,275; *Campbell v. Winton*, 1831, 9 S. 662; cp. *Fletcher*, 1681, 2 Br. Suppl. 7; *Hamilton v. Sinclair*, 1621, M. 16,925; *Thorntoun v. Miln*, 1665, M. 12,277.

⁶ *Williamson v. Allan*, 1882, 9 R. 859.

⁷ 1 Bell's Comm., 5th ed. p. 325.

⁸ *Dickson on Evidence*, 3rd ed. sects. 794, 814.

⁹ *Haldane (Speirs' Factor) v. Speirs*, *supra*.

¹⁰ *M'Keen v. Adair*, *supra*.

show that it was not given in acknowledgment of a debt due to the plaintiff.¹

Parole is admissible to prove that an I O U has got by error or accident or fraud into the wrong hands.²

A writing which simply acknowledges receipt of money by the granter, "taken by itself, is, in law, enough *prima facie* to entitle the granter to repayment,—it being, however, competent to the granter to rebut the legal presumption by competent evidence, instructing that the money was paid over on a different footing,—what is competent evidence depending on the nature of that which is proposed to be established."³ And, accordingly, where an I O U has been founded on as instructing a loan, parole has frequently been admitted in order to ascertain *quo animo*, or upon what footing the payment was made.⁴

Where in answer to an averment of loan, the defender admitted that he got the money and gave an I O U for it, but added that the lender had returned the I O U to him, with instructions to burn it, as she wished to make him a present of the money, he was allowed to prove his allegations by parole.⁵

4. "It has repeatedly been decided that a mere acknowledgment of debt does not require to be stamped."⁶ But difficult questions may arise from the terms of the acknowledgment. The rule, however, seems to be that where the document "does not take its character from the acknowledgment that money has been received, but from the acknowledgment involving an obligation whereby the granter becomes bound for its repayment," it does not require a stamp.⁷ Thus Lord Young does not think that "the legal character of an I O U as a document of debt is changed by adding to the words 'I owe you £10' those other words, 'which I received

¹ *Fesenmayer v. Adcock*, 16 M. and W. 449; *Lemere v. Elliot*, 6 H. and N. 656.

² *Henry v. Miller*, 1884, 11 R. 713; cp. *Ferguson, Davidson, & Co. v. Jolly's Trustee*, 1880, 7 R. 504, per Lord Mure.

³ *Thomson v. Geekie*, 1861, 23 D. 693, per Lord Wood.

⁴ *Haldane (Speirs' Factor) v. Speirs*, *supra*; *Williamson v. Allan*, *supra*; *Welsh's Trustees v. Forbes*, 1885, 12 R. 851, per Lord Young.

⁵ *Anderson's Trustees v. Webster*, 1883, 11 R. 35.

⁶ *Hamilton's Executors v. Struthers*, *supra*, per Lord Mackenzie.

⁷ *Welsh's Trustees v. Forbes*, *supra*, per Lord Craighill; cp. Addison on Contracts, 7th ed. p. 1120.

from you,' or by changing the form of the sentence to 'I have received £10 from you, which I owe you.' In short, it would not signify that the debt acknowledged is in respect of money received; it is still an acknowledgment of debt, and as such is of the legal character not requiring a stamp."¹

5. Where, in an action for repayment of money lent, an I O U is produced, signed it may be by the defender, but neither tested nor holograph, the proper course is to refer the obligation to the defender's oath, and to ask him in regard to the document "how he came to write it or sign it, and what was the object of expressing it in the particular terms which it bears."²

6. It seems never to have been doubted until recently that, when a creditor held an I O U holograph of, and signed by, his debtor, he could sue on the I O U without founding on the debt for which it was granted. In *Macpherson v. Munro*³ an I O U holograph of, and signed by, the granter was the foundation of the action; and the competency of such a course is recognised in the observations of Lord Wood and Lord Cowan in *Thomson v. Geekie*,⁴ of Lord Justice-Clerk Inglis in *M'Keen v. Adair*,⁵ of the same eminent judge in *Haldane (Speirs' Factor) v. Speirs*,⁶ in *Bowe and Christie v. Hutchison*,⁷ and in *Smith v. Smith*.⁸ In the two last cases Lord Deas expresses the same opinion. The practice seems to have been followed in the Sheriff Courts without question.⁹ And the only authority against it seems to be that of certain *obiter dicta* of Lord Young in *Neilson's Trustees v. Neilson's Trustees*,¹⁰ repeated by him in *Welsh's Trustees v. Forbes*.¹¹

P. J. H. G.

¹ *Welsh's Trustees v. Forbes*, *supra*; cp. *Thomson v. Geekie*, *supra*.

² *Hamilton's Executors v. Struthers*, *supra*; cp. Dickson on Evidence, 3rd ed. § 1503.

³ 1854, 16 D. 612.

⁴ 1861, 23 D. 693.

⁵ 1864, 2 M. 392.

⁶ 1872, 10 M. 537.

⁷ 1868, 6 M. 642; 40 S. J. 326. (The Lord President's opinion on this point is to be found only in the report in the *Jurist*).

⁸ 1869, 8 M. 239.

⁹ *Wilson & Co. v. Bell*, 1860; Guthrie's Select Cases, p. 349; *Hall v. Hall*, 1885, 2 Sh. Ct. Rpts. p. 99.

¹⁰ 1883, 11 R. 119.

¹¹ 1885, 12 R. 851.

ANOMALIES OF FRANCHISE LAW.

II.

A CURIOUS anomaly is introduced into the law by the Reform Act of 1868, as adopted and extended to the counties by the Reform Act of 1884. The sections of the 1868 Act which institute the household franchise in burghs, and the £5 ownership franchise and £10 occupation franchise in counties (sects. 3, 5, and 6), make it a condition in each case that the person claiming to have his name inserted in the register of voters, shall possess all the necessary qualifications "*when the Sheriff proceeds to consider his right.*" No such condition is attached to the lodger franchise, introduced into burghs by the same statute (sect. 4). The 1884 Act adopts, with all qualifications and conditions, and extends to the counties, the household and lodger franchises introduced into the burghs by the 1868 Act. In the counties, therefore, the condition that a person claiming to be registered as a voter must not only possess the necessary qualifications on the last day of July, but must retain such qualifications until the Sheriff proceeds to consider his right, applies to the £5 ownership franchise, the £10 occupation franchise, and the household franchise in counties; while in burghs it only applies to the household franchise. The condition does not apply to any other franchise than those mentioned. Thus it does not apply to the £10 ownership franchise, or to the lodger franchise, in either county or burgh, nor does it apply to the £10 occupation franchise in burghs. To take an example showing the anomaly more clearly, let us suppose a person owning, in a county, heritage exceeding £10 per annum in value. He sells the heritage in the month of August. According to the existing state of the law he would be entitled to be enrolled as a voter under the £10 ownership franchise, but would not be entitled to be registered under the £5 ownership franchise, because, when the Sheriff would proceed to consider his right, he would no longer possess it. Or take the cases of two different persons. One is an inhabitant-occupier who removes from one division of a county to another in the month of August. The other is a lodger who does exactly the same.

Both being duly qualified on the last day of July, the inhabitant-occupier loses his right, while the lodger does not.

The first observation we would make is, that it is absurd that these anomalies should exist; either the condition referred to should apply to all different kinds of franchise alike, or it should apply to none. But the further question arises, "Ought it to apply to any?" The idea upon which the condition is founded is, that whenever a man ceases to possess the necessary qualifications his right to vote should also cease, and we grant at once that the two things are co-relative. But, in order to constitute the necessary qualification, it is essential that the possession of the various elements which go to make it up shall exist for a certain period, for six months prior to the last day of July in one case, we have seen, and for twelve months in another. Keeping this in view, therefore, it may only be fair that a certain length of time should be allowed to a man before he loses a qualification. Suppose, for example, that a voter removes from house to house within the same constituency, it would, according to the established law of successive occupancy, be thought that the voter would retain his vote. But there is a case of this kind where he is subjected to the hardship of being struck off the roll for a year. Claims must be lodged on or before 21st September in each year. The Sheriff holds his Registration Courts between 25th September and 15th October. If a person, therefore, has made a good claim before 21st September, say as a householder, and before the Registration Court is held he removes to another house in the same constituency, he is liable to be struck off the roll. It is then too late to make a new claim, and there is no power to amend his claim. It is suggested, then, that if this condition is to exist at all, power should be given, in such circumstances as those stated above, either to make a late claim, or to amend the old one, or the condition should be altered to the extent that the claimant's circumstances and qualifications, at the date of his claim, and not when the Sheriff proceeds to consider his right, should be the *regula regulans* of his right.

The disqualification of voters for non-payment of rates in certain cases is another branch of our franchise law, which contains some anomalies that ought to be removed. In the

first place, disqualification for non-payment of rates only applies to certain classes of voters, and not to others. The Reform Act of 1832, in the institution of the £10 occupancy franchise in burghs, made the proviso (sect. 11) that the claimant shall have paid on or before the twentieth day of July in each year all assessed taxes which shall have become payable by him in respect of the premises for which he claims previously to the sixth day of April then next preceding. The only tax so payable now is the inhabited house duty, substituted by 14 and 15 Vict. cap. 36 for the window duty previously exigible under 48 Geo. III. cap. 55. This duty is payable by the occupier, except where the premises are occupied by more than one person, when it is payable by the owner. The Reform Act of 1868, in instituting the household franchise in burghs and the £14 occupation franchise in counties, made a proviso in each of these cases that no man should be entitled to be registered as a voter who should have failed to pay on or before the twentieth day of June in each year all poor rates, if any, that have become payable by him in respect of the premises for which he claims. The household franchise has been extended to the counties, and there has been substituted for the £14 occupation franchise in counties a £10 occupation franchise, but subject to the like conditions as formerly applied to the £14 occupancy franchise. The non-payment of rates is not a disqualification in any of the other franchises. Thus owners in both counties and burghs are not disqualified in this respect. Voters under the county leasehold tenancy are not subject to the disqualification. Lodger voters are free from it, and so also are those registered under the service franchise. Again, the payment of rates is a condition of the franchise only where rates are imposed, and they need not be imposed in the case of tenants and occupants of dwelling-houses in counties of annual rents of less than £4, because the rating body in counties have power, if they see fit, to assess the owners of such small houses. Where that power is exercised, therefore, it follows that a man who occupies a dwelling-house of the annual rent of, say £3, cannot be disqualified for non-payment of rates even though he fails to pay his rent, when a man who occupies a dwelling-house of the annual rent of, say £50, and who pays his rent

but fails to pay his poor rates, is disqualified. These anomalies ought to be removed, and they can only be removed by the removal of the disqualification for non-payment of rates, at all events as that disqualification at present exists. But payment of rates in some shape or form ought to be a condition, in every case, of the exercise of the franchise, and we would suggest the imposition of a uniform tax upon votes sufficiently large to ensure the voter's interest, and sufficiently small to be reasonably within the power of every voter to pay.

But the greatest of the anomalies of our franchise law is that there are so many different kinds of franchise for electoral voting. The parliamentary franchise is different from the municipal franchise, for the latter is extended to women. We do not offer an opinion as to whether the parliamentary franchise ought to be extended to women, but the fact that women are entitled to vote in municipal and other elections and not in parliamentary elections, is either a proof that it was a mistake to grant them electoral privileges at all, or it is an argument in favour of making the electoral privileges of women co-extensive with the electoral privileges of men. But the franchise for school board elections is different from both the parliamentary and the municipal franchise. We regard the parliamentary franchise as the highest, yet lodger voters and service franchise voters, under the parliamentary franchise, cannot vote in the election of a school board. A householder, too, of £3 may vote under the parliamentary franchise, but not under the school board franchise. We are of opinion that there ought to be one franchise for all electoral purposes. One roll made for the county, with the male voters in one column and the female voters in another, and subdivided to suit divisions of the county, burghs within the county, divisions of the burgh, parishes and districts, could be made to serve for all purposes, and would save to the country a needless expense in the construction of separate rolls.

J. C. G.

THE ABOLITION OF NOTARIAL INSTRUMENTS.

NOTARIAL instruments are merely evidence of one or more transmissions, and are intended to facilitate the registration of such evidence. They were invented to supply the place of instruments of sasine when these instruments were practically abolished, and when it might not be convenient or perhaps possible to register the deed of conveyance itself. It appears to be in accordance with the usual stages of law reform that unnecessary writs should be shortened before they are abolished, and this tendency of reform suggests the abolition of notarial instruments. If it is remembered that all the deeds on which the notarial instrument is founded may be already registered in some public register, it will be seen that the evidence of transmission is already published to the world, and the instrument in question is a piece of surplusage. The key to the reform suggested below is to treat all the registers of deeds and diligences as an organized whole, and facilitate references from one to another. It is merely an extension of the principle adopted in 1868, whereby it is competent to register a deed in the Books of Council and Session and also in the Register of Sasines, or in several County Registers of Sasines, by recording it fully in one, and marking a reference merely in the others. In suggesting the details whereby this reform may be carried out, we shall number the paragraphs following in such order as might be adopted in the Act of Parliament, which would be necessary to carry out the proposed changes.

1. There seems now to be no reason for keeping up the local Burgh Registers of Sasines. These might now be abolished, and the deeds for the future recorded in the Registers of the counties in which the respective burghs are situated. This is a reform which might advantageously be carried out apart from the proposals embodied in this paper.

2. If a deed of conveyance has at any time been recorded in the Books of Council and Session, it should be competent at any time, by writing a warrant on an extract, to register it in the Register of Sasines, and it should not be necessary to engross it in the Register of Sasines at full length, but a memorandum thereof, in the mode sanctioned by sects. 5 and 12

of the Land Registers Act, 1868, entered in the Register of Sasines, should be sufficient. This would carry out to its full length the idea involved in those sections, and link permanently and effectually those two Registers. And in like manner it may be possible to link together all the public registers in the country, even those of local Court Books. Unnecessary ones should be abolished.

3. We may take the simplest case first, that of a general disponee (Titles to Land Act, 1868, Schedule L). It might be competent to put a warrant of registration on the general conveyance somewhat in the following form:—"Register on behalf of A. B. C. and D., as trustees within-mentioned, in the Registers of the counties of X. Y. and Z., and with reference to the subjects described in the deeds enumerated in the annexed schedule. M. N., W.S., Edinburgh, Agent.

"Schedule before referred to.

"1. Instrument of Sasine in favour of P. in all and whole (*give abbreviated description*), recorded, etc.

"2. Disposition by S. in favour of P. of all and whole, etc. dated , and recorded, etc.

"3. Special Service in favour of P. as heir of Q. in all and whole, etc., dated , and recorded , etc."

The descriptions should be merely sufficient for purposes of identification, and should be no longer than those inserted in the Minute Books of the Register of Sasines. The recording of a general conveyance, with such a list of the subjects in which his author was infeft, should have the effect of infesting the disponee in all the subjects specified. As searching the records is done by means of names, there would be no difficulty in identifying the persons as well as the properties. The brief descriptions would prevent mistakes in the ledgerized record which is kept in the Register House as to each separate property.

4. If the granter of the general disposition were uninfeft, then a warrant of registration written on the original deed in favour of the granter in some such terms as the following should suffice to infeft his disponees:—"Register on behalf of A. B. C. and D., testamentary trustees [or general disponees]

of X., conform to Trust Disposition and Settlement [or otherwise as the case may be] recorded in the Books of Council and Session upon the day of , in the Register of the County of .

“ M. N., W.S., Edinburgh, Agent.”

Before the grantee could avail himself of this form of completing his title, he should record the general conveyances in some Court books. This form might also apply to a General Service, reference being made to the Court Books from which it is extracted.

5. In like manner Schedule N of the Titles Act may be dispensed with. The person in right of an unrecorded conveyance, no matter how numerous the transmissions, if they are all recorded in the Books of Council and Session, or Register of Sasines, or consist of extracts from Court Books, might simply complete his title by recording the original disposition, having previously engrossed thereon a warrant referring to each transmission, and specifying where it may be found recorded. *E.g.*, “ Register on behalf of A. B., who is in right of the foregoing conveyance in virtue of the following conveyances [or writs], viz.:—1. Assignment (*describe it, and give date of recording*); 2. General Service; 3. Trust Disposition and Settlement, etc., in the Register of the County of .

“ M. N., W.S., Edinburgh, Agent.”

6. The case of a trustee in bankruptcy or the liquidator of a company presents no difficulty (Titles Act, Schedule O). If the extract warrant in favour of the trustee, or the extract decree in favour of the liquidator, is only recorded in the Register of Sasines, with a warrant and schedule as specified in paragraph 3, it should operate as an infeftment of the trustee or the liquidator in all the heritable property belonging to the bankrupt or the insolvent company referred to in the schedule. If the bankrupt or other person was uninfeft, the warrant would be as suggested in paragraph 5, the reference being made to the Court Books from which the extract had been issued instead of to the Books of Council and Session.

7. In cases where it is unnecessary to record the whole of a deed, the principle embodied in the “ clause of direction ” (Titles Act, Schedule F) might be extended, and it might be

made competent to restrict the portions of a deed to be recorded, even though there were no such clause in the body of the deed, if the warrant specified the portion of the deed to be recorded. This would practically supersede Schedule J of the Titles Act.

8. These forms are all applicable, *mutatis mutandis*, to heritable securities.

9. It should still be competent to expedite notarial instruments, if it should be deemed expedient.

Nor need this principle stop with notarial instruments. Wherever an "estate in land" is created, and all that is desired is to substitute the name of one proprietor for another, this might be done in as simple a way as by the Moveables Transference Act of 1862. Why should it not be possible to annex a disposition to a recorded feu-contract or conveyance, just as may be done with an unrecorded conveyance under sect. 22 and Schedule M of the 1868 Act? A bond might be made as simple as a bill, with a statutory time and place of payment, and a conveyance in three lines, the discharge a simple receipt annexed to the bond and recorded in the Register, and assignments as simple also annexed when necessary. Such a system would come very near the registration of title that prevails in some foreign systems, and is adopted in the case of ships by ourselves, but it would retain in addition the advantages which our present system is supposed to possess.

In conclusion, the advantages which appear to accrue from the proposed changes may be noted.

1. Simplicity. The warrants on which a notarial instrument proceeds must always be examined, and this writ is merely a narration of them, more or less accurate. If an instrument is blundered it may be remedied, but often with considerable trouble. The plan proposed would merely secure that the transmissions, in so far as recorded, would be made available; and further, that registration of all conveyances, general or other, should be largely encouraged.

2. Economy. The cost of large numbers of instruments may be considerable, while the additional cost of recording conveyances would be small.

3. The saving of room in the Register House is a point

that should weigh with the public. Every unnecessary deed recorded is a public wrong.

4. To the profession every simplification of titles brings additional work. The cost of the transfer of land is a severe tax on landowners, and deters many from investing, while the advantages of the multiplication of landowners would accrue ultimately to the public. W. G. M.

THE WRITING ON THE WALL.

II.

BINKS was a lawyer and an alienist. Most ignorant people imagine that the latter is a peculiarly aggravated form of foreigner, but no reader hereof need be told that this is a mistake, and that an alienist is no other than a scientific student of the different forms and phases of insanity. Amongst other modes of study, Binks was in the way, when he got a chance, of securing an introduction to an asylum doctor, and visiting an establishment to observe the peculiarities of the different cases. In this way it happened that one day he was on a visit to the — Lunatic Asylum. Dr. Murray, the asylum doctor, had shown him several interesting cases indoors, and they were walking in the garden, when Binks observed in front of him a man busy weeding a border.

"Now," said Dr. Murray, "I see you know a good deal about this sort of thing, but here is a case that will puzzle you. Find out this poor fellow's delusion, and I shall be surprised indeed."

"Well, John," said the doctor, pulling up beside the patient, "there's a fine day."

"Yes, doctor, the rain has kept off wonderfully."

"This is my friend Mr. Binks, who is just taking a look round the place. Mr. Cooper—Mr. Binks."

The men's eyes met as they greeted each other, and instantly each recognised the other as an old schoolfellow.

"Bless me, Binks, you here!"

"Hulloa, Cooper, old fellow, what an age it is since I saw you!"

The old friends had much to talk about, and the doctor

strolled away round the garden to see what some of the other patients were about.

"It's a treat to meet an old schoolfellow, more especially as there's nobody worth talking to except the doctor in this hole," said Cooper; "let's have a seat here, and smoke a pipe," and he moved towards a bench on the grass walk. The conversation was a curious one. Cooper plied Binks with old reminiscences and inquiries after former companions. Binks assailed Cooper with allusions and questions bearing upon the ordinary delusions of the insane. The result was satisfactory to neither party. Binks was perplexed by the complete rationality of Cooper, and his failure to rise to any of the craftily prepared baits which were laid for him. Cooper, on the other hand, was mortified at Binks' apparent indifference to old associations, and more and more confounded by the utter irrelevancy of his replies, until at last it began to dawn upon him that the doctor's statement about Binks being there to see round the place was only a polite *façon de parler*, and that Binks had really been received as an inmate of the institution. By and by the doctor returned to take Binks away.

"Well, this beats me," whispered the lawyer to the doctor as he rose from the seat. "The man is as sane as you or I."

"Oh no, no, or he wouldn't be here;" and turning to Cooper, who was picking up his basket, "Well, John, it must be a pleasure to meet a kent face."

"Yes, it's a rare treat indeed here, doctor," replied Cooper; and then he added in an undertone to the doctor alone, "but after all the pleasure is a very mixed one. Poor fellow, to me that remember him, it's lamentable to see him thus. He's as mad as a hatter, and evidently full of all sorts of delusions; but I gave him no encouragement to open out upon them."

Binks, observing that Cooper seemed to wish to say something privately to the doctor, had moved off a step or two, when a cat, which had been gambolling upon the grass, came skipping up, and rubbed itself in a friendly way against his legs.

"Well, pussy, you're a very kindly beast," muttered Binks, and he was playfully drawing his stick up the tabby's

back, when suddenly he felt his arm grasped as in a vice, and turning round he saw Cooper, his face blazing with excitement and a wild terrified look in his eye.

"For God's sake, sir, don't do that. For God's sake, don't stroke that cat's hairs the wrong way."

"Bless me," exclaimed Binks, "I didn't mean to hurt the beast—I was only playing with it."

"Hurt the beast! — the beast," screamed Cooper, and he made a lunge with his foot at the cat, which bolted away amongst the bushes. "You may play with a beast, but, by —, sir, you shan't play with me," and he looked so dangerous, that Binks sidled towards a hoe which was lying upon the verge.

But the doctor's hand was on Cooper's arm, and the sound of his voice instantly soothed the poor maniac.

"Come, come, John, this will never do. You ought to be ashamed of yourself. Of course, Mr. Binks does not understand your case, or he would never have done such a thing. Come now, apologize and explain it all to him."

Cooper's indignation had entirely subsided, and given place to an expression of profound dejection before the doctor had finished speaking, and, with tears rising in his eyes, he began,—

"Oh, forgive me, Binks; but I was so terrified, I did not know what I was saying."

"Oh, it's all right," replied Binks, whose curiosity was reviving with his subsiding anxiety; "but I really did not see anything so far wrong in titivating a cat's back."

"No, no, not for you, but for me a thousandfold."

"Dear, dear, and how does it affect you?"

"Affect me?" replied Cooper, with a gleam of returning excitement in his eye. "Magnetism, electricity, mesmerism: a threefold cord which no man can break!"

"Oh, that's it, is it?" said Binks, glancing significantly at Dr. Murray.

"Well, well," said the doctor, who feared a renewed paroxysm, "we had better say no more about it in the meantime. I see it would be too much for you, John; but I'll explain it all to Mr. Binks."

Binks bade Cooper a friendly good-bye.

"I thought it as well to keep up the form of the thing and say good-bye," said Cooper to the doctor, the moment Binks' back was turned. "I hope I shall see a good deal of him whilst he's here: though I suppose he will be a paying patient."

III.

John Cooper was the most brilliant schoolboy and student of his time at St. Andrews. The son of a peasant woman, who died young, and of a dissipated father, who married again and went to the colonies, he had been reared by his maternal grandmother, a thrifty, hard-working old woman, who had a cottage and a small croft, on which she kept a cow, at Strathkinnes, a village in the east of Fife, some three miles from St. Andrews. Mrs. M'Ara had little more than was enough to keep herself and her grandson in clothes and food. But secondary education was cheap at St. Andrews, and John was able to walk into that town every day for his classes. In this way he obtained a good school education; and on leaving school he gained a bursary, which enabled him to continue his studies at the university. But a Scottish university course gives far too long an interval of leisure in the summer; and in the summer young Cooper used to try to do something for himself and his grandmother, who was getting rather past much active work, by private tuition. This he readily obtained at St. Andrews; but, after his third session, the reputation he had made by the almost unprecedented feat of taking the first place in moral philosophy, and in the third Humanity, Greek, and mathematical classes, was such that he received a very tempting offer from a wealthy Glasgow merchant to spend some months in his house, as private tutor to one of his sons who had been at a badly conducted school, and who needed close coaching to enable him to enter an English university in the autumn. This was the first time that Cooper had been separated for more than a day or two from his grandmother; and, naturally, the old woman missed the boy much, and fretted a good deal at her loneliness. But the summer would have slipped away, and the loneliness would have been forgotten, when

classes were resumed in the winter, but for the overwhelming catastrophe which overtook young Cooper in the course of his engagement. The story of this misfortune, as Dr. Murray narrated it to Binks, was as follows.

Bradley, an Oxford undergraduate, happened to be visiting at the mansion near Dollar, which Cooper's employer, Mr. Russel, had taken for summer quarters; and, one evening after dinner, the conversation turned upon the subject of mesmerism and telepathy. The undergraduate dabbled in the art, and made some vaunt of his powers, when he was at once smartly taken up by Purves, a sceptical young doctor, who happened to be of the party, and who ridiculed the pretensions of the Oxonian. The latter, who was a member of the psychical circle at his University, and steeped in mysticism and hypernaturalism, resented somewhat warmly the sneers of the doctor, and volunteered to submit his powers to the test.

"I'll tell you what I'll do. I'll mesmerize you. Then I'll give you something, and tell you to go out and hide it wherever you please. I'll waken you up when you come back, and you will not be able to tell where the article is hid. Then I will mesmerize you again, and I'll go and find the thing myself, you following three paces behind me all the way."

"Bosh!" exclaimed the doctor.

"Well, try."

The doctor declined, but suggested that the tutor, who sided strongly with him in the argument, might lend himself to the experiment. Cooper, who was full of scientific enthusiasm, consented with alacrity, and in five minutes he was hypnotized.

"Well, what will you hide," asked Bradley, when the trance was fully induced. Cooper looked round and pointed to a mourning ring upon the hand of Mary, a girl of fifteen, who was a niece of Mr. Russel, and on a visit in the house.

"Very well. Mary, you don't object?"

The girl hesitated. "But you are sure, Mr. Bradley, the ring won't be lost?"

"Perfectly sure of that, I'll go bail for it," replied Bradley; and the girl yielding, though still with some reluctance, handed Bradley the ring, which he placed in Cooper's hands.

"Now, go and hide that ring somewhere, don't speak to anybody, but come back here at once when you have done it."

Cooper departed with alacrity, and the party awaited his return with some excitement. It was long ere he came back, and as minute after minute slipped away the tension of feeling increased. Mary was visibly uneasy about her ring; the doctor almost insolently cynical; Bradley alone appeared perfectly unperturbed, and awaited the return of Cooper with every appearance of confident assurance.

At last, after nearly half an hour, he came. They watched him from the window as he strode rapidly across the gravel, and saw in a moment that he was still in the trance. Every one held his breath as the sleeper stepped into the drawing-room.

"Well, is it safely hidden?" inquired Bradley.

Cooper nodded assent.

"You are quite sure you know where it is?"

Again Cooper nodded.

"Very well, then," said Bradley, "to proceed with the experiment"—and he blew in Cooper's eyes, and made the negative passes. In a moment Cooper was looking round the room, quite himself again, but evidently in much amazement.

"Well, did you hide the ring?" inquired Bradley again.

"Hide the ring? No; what ring?"

"Why, Miss Mary's ring to be sure. You told us just now you had hidden it."

"Me! I never said such a thing. But what have I been doing; did I really hide something? I wasn't out of the room was I?"

"Are you satisfied so far?" inquired Bradley, coolly turning to the doctor. The latter grunted a surly assent.

"Well, to continue the experiment"—

But the party had reckoned without their host, for a heavy step was heard in the hall, and one of the boys exclaimed, "Halloa, here's the governor!"

The door opened, and in stepped Mr. Russel, evidently very much put about, and panting, after an unusually rapid ascent of the hill up to the house.

"Hi, hi—is Mr. Cooper here? Why, sir, what is all this nonsense?"

It appeared that whilst enjoying his evening cigar down near the river, the worthy gentleman had observed Cooper skulking along in a mysterious way, and had accosted him; but the tutor made no answer, did not indeed even look round, and slunk away rapidly into deeper cover. Of course an explanation of what was going on had to be given to Mr. Russel, and this was fatal to the completion of the experiment. Highly indignant that anything so extravagant and uncanny should have been set about on his premises, he absolutely prohibited any renewal of the *séance*.

"If there is nothing in it," said he, "it's silly; and if there's anything in it, it's sinful: and in either case it shan't go on in my house."

"Very good," remarked Bradley, "I shall respect your wishes; but I am bound to tell you frankly unless the experiment be renewed, the ring cannot be recovered."

"Oh, but it must be recovered, uncle, it has poor Jeannie's hair in it," exclaimed Mary, the tears starting to her eyes, for the ring was a memento of an elder sister whose death was still an open sorrow. But Mr. Russel would not relent, and so the matter stood over the night, though Bradley plainly told him that the lapse of any considerable interval, even perhaps a single night, might render it impossible for him to re-awaken the recollection of the hiding of the ring. Mr. Russel was the less disposed to be moved by such a consideration, as he regarded the whole affair as a silly piece of tomfoolery, and he was naturally indignant that Cooper should have carried the matter so far as not to respond when he accosted him. He expected, accordingly, that the ring would be quietly restored in the morning, and no more was said about the matter that night. It was therefore with considerable annoyance that next forenoon Mr. Russell was disturbed at his letters by the entrance of Mary, with a tearful appeal about the lost ring. He listened to her story, and at once sent for Cooper and Bradley, and told them that the ring must be restored without further nonsense. "If that be not done, Mr. Cooper, within half an hour your engagement here ceases; and," he added, with significance, "I shall then look to another authority to recover the ring."

It was in vain that Cooper protested, and Bradley tried to

reason the matter. Mr. Russel was inexorable, and Cooper would have been dismissed upon the spot but for the friendly intervention of Doctor Purves, who came to the study on hearing of the dispute, and who assured Mr. Russel that though he himself did not believe that Bradley possessed all the powers he professed, or that the ring could be recovered by a renewal of the trance, still the existence of such trances had been scientifically verified, Cooper had undoubtedly been in a trance when he got the ring, and it was scientifically probable that on awakening he could not remember what he had done whilst in the state of trance.

Mr. Russel was so far moved by these representations that he felt that he could not make a serious affair of the abstraction of the ring, and the matter was allowed to stand over again. But the ring did not reappear, and the whole incident was so distasteful to Mr. Russel that he determined to terminate Cooper's engagement; and accordingly one morning, a week after the loss of the ring, Cooper found himself dismissed, with his full salary to the term of his engagement, and the assurance that there was no imputation against him. He returned to Strathkinnes and resumed his studies, and November found him again at the university. But from the day of his return home, his friends marked a change in him. He was not his old self. At first he complained of headaches. Then depression, which gradually became more intense, settled upon him. He became querulous and irritable, seemed to lose all faculty for application, and stood nowhere in his class examinations. A doctor was consulted, who prescribed for dyspepsia; but that did no good. The poor lad gradually got worse, he ceased to attend his classes, delusions settled on his mind; and April, which should have seen him a graduate of the university, found him an inmate of an asylum. As the case developed, it gradually became evident that what preyed upon the patient's mind was the ring incident. He was oppressed with a notion that he was blamed for stealing it; he was in constant dread of apprehension; he knew half a dozen people had seen him get the ring, and that he had failed to restore it. He believed, therefore, that he had no defence which would hold in a court of justice. Coupled with this morbid delusion there was a constant sense that he

was still to a certain extent under the mesmeric influence, and with strange perversity, in view of the history of the incident, he believed that it was this influence which hindered the recovery of the ring. An examination of the lad's papers threw further light upon the case. It was obvious from the mass of amatory verses amongst them that he had conceived a passionate affection for the owner of the ring, and the medical man had no difficulty in associating this amongst the causes which had upset his mental balance. There was fortunately nothing in the facts to suggest that he had ever intruded his sentiments upon this object, or that the girl had ever bestowed upon him a thought of other than good-natured indifference. Under asylum treatment Cooper gradually threw off his melancholia, and recovered his intellectual tastes and interests; but the delusions about the ring and mesmerism remained as strong as ever. Of magnetism and electricity, which he associated with the hateful mesmeric influence, he had a profound horror. Poor Mrs. M'Ara did not long survive the terrible blow sustained in the worse than death of her grandson, and soon sank in sorrow and desolation to the grave.

"But now tell me, doctor"—began Binks, when Dr. Murray had concluded his recital.

"I know what you are going to ask," interrupted the doctor. "Everybody asks, after hearing of a case of this kind, whether a patient so eminently rational on all other matters cannot be quietly reasoned out of his delusion?"

"Pardon me," replied Binks, "but I am hardly such a novice in these studies as to ask that. My question is this: Suppose the ring were actually found, and Cooper were satisfied of the fact, would that, in your opinion—I do not say restore him at once—but would it give him a prospect of recovery?"

Dr. Murray hesitated for a moment, and then replied with great deliberation, "I think not. Speaking as an expert in the matter, I should say that, from experience of such cases, the probabilities are all against such a discovery now making any difference other than perhaps a change in the precise form or expression of the delusion; but," he added, "I cannot say, I have no scientific warrant for saying that such an

occurrence might not have a beneficial effect, or even lead to a permanent cure."

"There is another question I should like to put," continued Binks. "Has hypnotism never again been tried? might not Bradley, or, failing him, some other mesmerist, be got, as a desperate experiment, to reinduce the trance, in the hope that it might reawaken a lost train of memory, and enable Cooper to find the ring?"

"No," replied the doctor; "I confess the idea has more than once occurred to me, but in the present state of scientific opinion upon these matters, I dare not attempt such an experiment, even if I myself believed it would prove successful. But I do not believe it would. I believe that the possibility of recollection is irretrievably lost, and that any such experiment might occasion a mental cataclysm which would entirely destroy what is left of the poor fellow's mind."

IV.

A few days after his visit to the asylum, Binks received a letter from Cooper, in which the latter apologized with much contrition for the scene he had occasioned, and confessed with frankness, and further apologies, the mistake he had made as to the explanation of Binks' presence at the asylum. The letter then proceeded, "And now, Binks, I appeal to you as almost my only friend who is left. Dr. Murray has, I believe, told you my sad story. I believe the ring may yet be found. I constantly think I see my old granny at night. I don't know whether I am waking or dreaming; but she looks at me so earnestly, and always says, 'Look in the cupboard.' Now, Binks, I am more and more persuaded that the ring is to be found in the cupboard between the fireplace and the window in the old cottage at Strathkinnes. Of course, if it is found there, it won't clear me—in fact it will conclusively condemn me; but still, at all costs, I desire to make full restitution to the poor girl I have so cruelly injured. Now will you, as a friend and brother, go to Strathkinnes, carefully search the cupboard, and let me know the result?"

The letter had, of course, been opened by Dr. Murray, who added a postscript, "Write the poor fellow a soothing letter,

but, of course, say nothing to encourage this absurd nonsense about the cupboard. I fear this is some new delusion developing itself."

Binks complied with Dr. Murray's instructions. He wrote Cooper a kindly letter, accepting the apology, but advising him to consult Dr. Murray about the cupboard, as being the person most conversant with the whole matter, and most likely to lead inquiries to a satisfactory issue.

"But," said Binks to himself, as he dropped the letter into the pillar, "Dr. Murray or no! I confess I have a hankering after a rummage through that cupboard."

Obituary.

J. BOTTOMLEY FIRTH, ESQ., M.P.—The late Joseph Bottomley Firth, Esq., barrister-at-law, of the Middle Temple, whose death was occasioned by a sudden attack in the region of the heart, whilst ascending a mountain near Chamounix, Switzerland, on the 4th September, was a native of Huddersfield, Yorkshire, and was born in the year 1842, his father being Mr. J. Bottomley, a merchant and manufacturer there, and a member of the Society of Friends. He was educated at the London University, where he took his Bachelor's Degree in the Faculty of Law in 1865. In Trinity Term 1866 he was called to the Bar at the Middle Temple, where he had entered himself as a student as far back as Michaelmas 1863. He joined the North-Eastern Circuit, but preferring political life to legal studies, he became president of the Municipal Reform League, in which capacity he speedily made himself felt, and his voice heard, whilst advocating many important changes in the government of the city and the suburban districts, which have since been embodied in the new County Councils. It was on account of his efforts in this direction that in April 1880 he was chosen as the colleague of Sir Charles Dilke as the representative of the borough of Chelsea. Though returned by a majority of over 2500, he was not successful in seeking re-election by his old constituents at the General Election of 1885, in North Kensington, and remained

without a seat in Parliament until last year, when he was chosen on a casual vacancy for the burgh of Dundee. He was elected last year also a member of the London County Council, and soon after its first meeting was chosen deputy-chairman of that body. From 1876 to 1879 he was an active member of the London School Board; and he was the author of a semi-legal work, *Municipal London*. Mr. Firth, who took that name in 1873, in lieu of Bottomley, married, in 1878, Elizabeth, youngest daughter of George Tatham, Esq., formerly mayor of Leeds, who survives as his widow.

C. H. ANDERSON, ESQ., Q.C., M.P., whose death occurred on the 25th August at Johannesburg, after a short illness, was the youngest son of the Rev. Richard Anderson, of the Grange, Bedale, North Yorkshire, and was born in the year 1838. He was educated privately, and was entered as a student at the Inner Temple in Michaelmas Term 1864. In the following year he was elected to a Law Exhibition, and was called to the Bar by the above-named honourable Society in January 1867, when he joined the South-Eastern Circuit. He took silk about three years ago, and entered Parliament at the last General Election in the Gladstonian Liberal interest for the counties of Elgin and Nairn, defeating Sir George Macpherson Grant by a majority of 120.

MR. JOHN MACVEAN, Solicitor, Buckie, died at Ballater on the 9th September.

Appointments.

MR. JAMES MOIR, Writer, Glasgow, has been appointed to the Chair of Conveyancing in the University of Glasgow, vacant through the death of Sir James Robertson.

MR. ANDREW ROSS, S.S.C., has been appointed an Assistant Clerk in the Court of Session in room of the late Mr. James Webster. Mr. Ross has for some years been Secretary to the National Union of Conservative Associations in Scotland, and is the author of a work on the Colours of the Highland Regiments.

The Month.

Novel Cestuis que Trustent.—In the case of *Re Dean ; Cooper-Dean v. Stevens* (60 L. T. Rep. N. S. 813 ; 41 Ch. Div. 552), recently heard before Mr. Justice North, it was gravely argued that a gift of an annuity for the maintenance of the testator's horses, ponies, and hounds was void because it was in its nature a "perpetuity." The ground on which this argument was based was, that the gift depended on the lives not of human beings, but of animals. This distinction between the mortality of human beings and animals is too subtle for most minds to comprehend, and Mr. Justice North had no difficulty in coming to the conclusion that no perpetuity was contained in the annuity. The gift, however, though held to be valid, is in the very curious position that its execution cannot be enforced by any one. The *cestuis que trustent* are horses and dogs, and as yet neither horse nor dog has been allowed to have a next friend at law.



Jury Challenges.—The trial at Chicago of certain persons charged with the murder of Dr. Cronin recalls attention to the form of challenging the jurors. The statutes of the State of Illinois provide that, if a person had read an account in a newspaper of the crime with the commission of which the accused is charged, it shall not be allowed to challenge him as a juror, if he states on oath that he believes he can give an impartial verdict according to the sworn evidence. In the Cronin case the presiding judge has permitted the following four questions to be put to proposed jurors who had read newspaper reports:—"Do you believe that Dr. Cronin was driven away in a buggy hired from stableman Dinan by Coughlin? Do you believe Burke was one of the tenants of Carlson Cottage, and that Dr. Cronin was killed there? Do you believe Dr. Cronin was killed pursuant to the appointment of the Trial Committee in Camp 20 of the so-called Clan-na-Gael Society? Do you believe a conspiracy had been formed, and that any of these defendants belonged to that conspiracy?"

According to Hawkins' Pleas of the Crown, in England a juror may be examined on the *voir dire* as to his qualification or affection, but not as to matters tending to his own discredit, nor as to having expressed an opinion as to the guilt of the defendant. But in the case of *Reg. v. Cuffey*, tried at the Central Criminal Court in September 1848, in which the prisoners were charged with treason felony under 11 Vict. cap. 12, the latter question was asked, the Attorney-General not taking objection on behalf of the Crown.—*Law Times*.

* * *

A Long Lawsuit.—Some days ago there was terminated at Warsaw a lawsuit which has lasted four centuries. The object of litigation was a piece of uncultivated ground of 40 acres between the estates of Orlowo and Podlowo, which was claimed by the two proprietors of them. The suit was commenced in 1490, and, curiously enough, was at last brought to an end by amicable arbitration.

* * *

Circumstantial Evidence.—A student said to a distinguished lawyer one day, "I cannot understand how circumstantial evidence can be stronger than positive testimony." "I will illustrate it," said the lawyer. "My milkman brings me a can of milk, and says, 'Sir, I know that is pure milk, for I drew it from the cow, washed the can thoroughly, strained it into the can, and nobody else has handled it.' Now, when I take the cover from the can, out leaps a bull-frog. Surely, the frog is stronger evidence than the man!"—*Albany Law Journal*.

* * *

Reduction of Capital.—Petitions for the reduction of the capital of joint-stock companies, under the powers conferred by sections 9, 10, and 11 of the Companies Act, 1867, and by the Companies Act, 1877, are of frequent occurrence. The question is therefore an important one which has lately arisen as to the power of a company by special resolution to reduce its ordinary shares without reducing its preference shares at the same time and in the same proportion. The Acts do not

in express terms say whether or not it is necessary that the reduction should be equal on all classes of shares into which the capital of the company is divided. In *Re Barrow Hæmatite Steel Company* (59 L. T. Rep. N. S. 500 ; 39 Ch. Div. 582), Mr. Justice North stated it to be his opinion, that "the reduction, so far as the Act goes, may be applied to part of the shares and not to the whole," though in that case the whole of the shares, including the preference shares, were actually reduced by one-fourth. In *Re Quebrada Railway, etc., Company* (60 L. T. Rep. N. S. 482 ; 40 Ch. Div. 363) the same learned judge confirmed a reduction of ordinary shares, leaving the preference shares untouched, it having been shown that circulars fully explaining the proposed reduction had been sent to all the shareholders. The question has quite recently, in *Re Union Plate Glass Company*, come before Mr. Justice Kay, who, refusing to follow the opinion of Mr. Justice North expressed in *Re Barrow Hæmatite Steel Company*, and acted upon in *Re Quebrada Railway, etc., Company*, held that it is *ultra vires* of a company to reduce some of its shares without reducing all. In this conflict of authority upon so important a point of company law, it is to be hoped that the opinion of the Court of Appeal may shortly be taken upon the question. —*Law Times*.



Definition of "Personal."—Said Lord Wellesley to Plunkett : "One of my aides-de-camp has written a personal narrative of his travels ; pray, what is your definition of 'personal' ?" "Well, my Lord," was Plunkett's reply, "we lawyers always consider personal as opposed to real."—*Virginia Law Journal*.



Criticism of Public Officers and Candidates for Office.—The present English law may be summarized as follows :—

1. What is true may be published of any man, public or private, and proof of the truth of the charge, under a plea of justification, will be a complete defence in a civil action ; and it seems that comment and criticism upon any man, public or private, is permissible, if truth and justice warrants it.

2. Fair comment and criticism may be publicly made

upon the public acts of public men, and upon such of their private acts as show them to be unfit for public station, but not upon their private acts of other kinds.

3. Criticism or comment denotes, in general, the expression of opinion or judgment upon the public person's acts, and includes the inferring of motives for acts which he has actually done, if there be foundation for such inferences; but charging him with wrongful acts, which he has not done, is not criticism, but false accusation, which the law does not allow to be publicly made; nor is public comment, based upon such false charges, permissible.

4. Comment, to be "fair," must be made with an honest belief in its truth and justice, and such belief must be based upon reasonable grounds; if it has these qualities, it need not be strictly true and just; but honest belief alone will not warrant false and unfounded inferences and imputations.

5. The acts criticised must be real acts, that is, such as have actually occurred. "Acts," as the word is here used, denotes things said as well as things done. But if a competent Court has adjudged a man guilty of certain acts, these acts may be taken as real and made the basis of criticism. So mental qualifications for public office are proper matters for discussion.

6. The Court is to decide whether the case is one permitting public comment, and also to instruct the jury as to what the law regards as fair comment; the jury are to find whether the comment in the particular case is really fair and legitimate.

7. The publication of fair comment may be made to the public generally, as *e.g.* through the newspapers or magazines.

8. These rules apply, in general, to all matters of public interest.—*American Law Review.*



A Court of Criminal Appeal.—The following is an article by Mr. H. B. Poland, Q.C., which appeared in *Pump Court* for October 27, 1887, and to which Lord Bramwell alluded in his letter to the *Times* last month. "Mr. Poland," added his Lordship, "has more experience than all the judges and ex-judges combined, and is most strongly against such a Court, and gives most convincing reasons for his opinion."

"When a doubt," says Mr. Poland, "is raised as to the correctness of a conviction in a case of public interest, the suggestion is generally made in various quarters that the Government should, without delay, introduce a Bill to give an appeal on the *facts* in criminal cases, and not leave the final decision to the Secretary of State for the Home Department. Many lawyers of great experience are strongly opposed to such an appeal being given; and, to assist in dealing satisfactorily with the subject, I will point out some of the difficulties in the way.

"The Court for the Consideration of Crown Cases Reserved, which can only decide questions of law, usually consists of the Lord Chief-Justice of England and four of the judges, and it has been proposed that this Court should have the power of granting new trials in criminal cases. The code, as settled by Lord Blackburn, Mr. Justice Barry (one of the judges in the High Court of Ireland), the late Lord Justice Lush, and Sir James Fitzjames Stephen, was afterwards introduced into the House of Commons, in the shape of a Bill, by the Attorney-General (Sir John Holker), and amended in Committee. Article 544 is as follows:—'Application for a new trial.—After the conviction of any person for any indictable offence, the Court before which the trial takes place may, either during the sittings or afterwards, give leave to the person convicted to apply to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.'

"'In the case of a trial before a Court of Quarter Sessions for any county, riding, division, or part, such leave may be given, during or at the end of the session, by the justice who presided at the trial and one other justice present at the trial.'

"The Commissioners in their report upon this article state that 'it is more difficult to provide in a satisfactory way for an appeal upon matters of fact. It is obvious that the only practicable means of giving such an appeal is by permitting convicted persons to move under certain circumstances for a new trial, *either on the ground that the verdict was against the evidence, or on the ground that the verdict had been shown to be*

wrong by facts discovered subsequently to the trial. If the ground on which a new trial is sought for is that the verdict was against the evidence, the case is comparatively simple. In such cases the judge before whom the case was tried ought to have power to give leave to the convicted person to apply to the Court of Appeal for a new trial. If the convict had an absolute right to such an application, it would be made whenever the convict could afford it. By making the leave of the judge who tried the case a condition for such an application, such motions would be practically confined to cases in which the judge thought the jury had been harsh towards the prisoner. However, when the application was made, the Court of Appeal could deal with it as in civil cases.'

"Is it likely that this provision can work? A judge who has been trying cases, and who has been constantly telling the jury that they ought not to convict the accused unless the evidence establishes his guilt beyond all reasonable doubt, is to state that there is doubt, and that the person convicted may apply for a new trial on the ground that the verdict was against the weight of evidence.

"The judges of Assize, the recorders and justices at Quarter Sessions are not only to try cases, but are to hear motions for leave to appeal. In numerous cases, where the person convicted was defended by counsel, applications would be made, but what is to become of the cases in which the person convicted could not afford to employ counsel? Is the judge to say to the undefended prisoner, in the presence of the jury who has tried him, 'I am not satisfied with the verdict just returned, and I give you leave to apply to the Court of Appeal on the ground that the verdict was against the weight of evidence'? Or is he to send for the prisoner on a subsequent day, and make a like communication to him in open court?

"Is a prisoner who is undergoing his sentence to be brought before the Court of Appeal to move for a new trial, and would any such motion be satisfactory unless the judge who tried the case was present to point out to the Court of Appeal the reasons why he gave leave to appeal. How often is it in criminal cases that there is a verdict of guilty returned

against the weight of evidence? There are frequently verdicts of acquittal so returned, and no one has ever been bold enough to suggest that the Crown should be entitled to apply for a new trial, although the effect of refusing one is to turn a murderer or garrotter loose on society. *Will not juries be more likely to convict than at present?* May they not say, 'If we acquit the prisoner, he will go free; but if we convict him and we are wrong, he can apply for a new trial.'

"Then there is the difficulty arising from the fact that the Court of Appeal does not sit from the 12th of August till the 24th of October, and from the fact that during other parts of the year, owing to a large number of judges being on Circuit, it will be next to impossible to make a Court of five judges. Article 541 deals with the evidence for the Court of Appeal. Suppose a new trial to have been granted, either unanimously or by a majority of the members of the Court, what will the second jury do? They will know that the former verdict of guilty was deemed to be against the weight of evidence, and will not an acquittal in all such cases inevitably follow, and whatever the result, why should the second verdict be considered better than the first? If the second jury acquitted, there ought to be a third trial to determine which jury was right, the first or second? What, however, is to happen if, on the second trial, the prisoner is too poor to get his witnesses? In cases of murder the witnesses for the Crown are now examined four times in all, viz.: before the coroner, before the committing magistrate, before the grand jury, and at the trial; and sometimes they are also examined by the Crown Solicitor at his office. Is it not a little too much to make them give evidence a fifth or sixth time?

"Moreover, will the second trial, in the event of its ending in a conviction, prevent the same kind of appeals which are now made to the Home Secretary being continued, and in some cases with much greater force, because it may be urged that the conviction on the second trial being on substantially the same evidence as on the first, it ought not to stand, as the judge who tried the case in the first instance gave leave to appeal, and the Court of Appeal unanimously granted a new trial? May there not be a wrong verdict given in consequence of the summing up of a judge or chairman of Quarter

Sessions, who took a strong view of the prisoner's guilt; and ought the right to move the Court for a new trial to depend on the leave of the judge who tried the case? He could hardly be expected in such circumstances to grant leave. All will remember the old story of the Court in Banc telling the counsel who was moving for a new trial, that Mr. Justice —— who tried the case had reported that he was not dissatisfied with the verdict, whereupon the counsel replied: 'I should, my Lords, indeed have been much astonished if he had done so, considering the trouble he took to get it.' Further, if an appeal is allowed, why should it not be allowed because the sentence is too severe? I have known few wrong convictions (and they will be less in number when prisoners are entitled to give evidence), but many wrong sentences; and if a man is to have an appeal because, being innocent, he ought not to have *any* sentence, surely he ought to have an appeal when he gets a sentence of five years' penal servitude when he only ought to have had a sentence of twelve months' imprisonment. There will, no doubt, be considerable difficulty in altering sentences. The late Mr. Russell Gurney, recorder of London, used to tell a story about the anxiety he once had in deciding as to the proper sentence to pass in a case which he had tried, so he asked the advice of two judges who came down to the Central Criminal Court. One judge told him that he did not see how he could pass a less sentence than five years' penal servitude, and the other judge said he thought twelve months' imprisonment would not be too much. However, judges who were constantly in the habit of reviewing sentences would soon be able to agree as to the proper sentences to be passed.

"The Commissioners truly say, 'A much more difficult question arises in relation to cases, which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place.' Article 545 deals with this subject, and gives the Secretary of State the right of directing a new trial on his own undivided responsibility. It is as follows:—'New Trial by Order of Secretary of State.—If, upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, one of Her Majesty's Principal Secretaries

of State in England, or in Ireland the Lord Lieutenant, entertains a doubt whether such person ought to have been convicted, the Secretary of State, instead of advising Her Majesty to remit or commute the sentence, and the Lord Lieutenant, instead of remitting or commuting it, may, after such inquiry as he thinks proper, by an order in writing, *direct* a new trial at such time and before such Court as he may think proper.'

"This will be a ready means of enabling the Home Secretary to escape from the unpleasant duty which he now has to perform, but is it desirable that he should have this power? If, in the event of the new trial so ordered, a second verdict of guilty is returned on substantially the same evidence, is he to allow a man to be executed, notwithstanding he entertained a doubt whether the evidence was sufficient to show that the man ought to be convicted?

"It may be asked if the present system is in all respects satisfactory. My answer is that it is much more satisfactory than what is proposed to be substituted for it. A criminal trial now is not like a civil trial, where the plaintiff or defendant does not often know what evidence is to be given against him, and where one party or the other may be and often is taken by surprise; but in a criminal trial the accused and his solicitor and counsel know, or ought to know, fully from the depositions taken before the magistrates what the case is they have to meet, and in a case of murder or manslaughter they have the coroner's depositions in addition, and if fresh evidence is discovered after committal, they have notice of that also. The Crown, however, is sometimes taken by surprise, because the accused is under no obligation to give notice of the witnesses he intends to call, and a perjured alibi is almost invariably sprung upon the prosecuting counsel in Court at the last moment.

"I have not lost sight of the fact that in criminal cases which have been moved by certiorari into the Queen's Bench Division of the High Court, the convicted person could always move for a new trial *without the leave of the judge*, but these are generally exceptional cases in many respects. They consist of libels, frauds by directors of public companies in issuing false balance-sheets, complicated cases of fraud

and conspiracy, cases under the Foreign Enlistment Act, nuisance cases, and the like, and in all of them the accused have the means to be represented by counsel throughout the proceedings. The anomaly, however, remains, that if a man is tried on an indictment in one Court and convicted, he cannot move for a new trial, and if tried and convicted in the other Court, he may do so. Having regard to all the difficulties, I would suggest that it is better that the preliminary inquiry before the magistrate should be *full and complete*, and that the trial, which takes place when both sides are ready, should be conducted on the principle that—

Truth can never be confirm'd enough,
Though doubts did ever sleep ;

and be final, so far as the jury are concerned, subject, of course, to the intervention of the Secretary of State, as at present. When the correctness of a conviction is called in question, few know the trouble that is taken at the Home Office by every Home Secretary to get at the truth.

“The Secretary of State is assisted by the judge who tried the case, by the permanent Under-Secretary, and if it be deemed necessary, he can direct the Solicitor of the Treasury to take the statements of all persons who were not examined at the trial, and report to him upon the case. He can also take into consideration matters which could not be legally proved at the trial. The present system might be improved if the Secretary of State had the right to call to his assistance two or three of the judges, or ex-judges, to advise him in difficult and serious cases, and so relieve him from the anxiety which is at times almost too much for any one man to bear. A decision arrived at by a *domestic forum* so constituted would have much greater weight than the decision of the Secretary of State alone.

“When the judge who tries the case is dissatisfied with the verdict, and the Secretary of State, either upon the evidence given at the trial, or upon fresh information laid before him, advises Her Majesty to grant a pardon, there is, no doubt, the anomaly that the convict is pardoned for an offence which it is supposed he never committed. Some provision ought, therefore, to be made, under the present

system, to quash the conviction, so that he might be restored to all his civil rights, and some mode of doing this might be carried out short of sending the case down in order to get a second jury to return a different verdict to that returned by the first. Many amendments are wanted in the criminal law, but the uncertainty and delay which would be introduced by allowing new trials would, I venture to think, far outweigh any advantage likely to be derived from the proposed change in the criminal procedure of this country."



Contributory Negligence.—A judgment by Justice James, sitting in the Supreme Court of the District of Columbia, is reported by the *Washington Law Reporter*, on the subject of contributory negligence, from which we take the following headnote :—

" 1. In an action for damages to recover for injuries received by reason of the negligence of the defendant, the burden is upon the defendant to show by a preponderance of evidence contributory negligence on the part of the plaintiff, if that is set up as a defence.

" 2. In establishing such preponderance the defendant is not confined to the testimony offered in his own behalf, but he may adopt such of the plaintiff's testimony as tends to show contributory negligence.

" 3. An instruction which leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be recorded as contributory, should not be granted.

" 4. The Court should not rule as a matter of law that the plaintiff has been guilty of contributory negligence unless the facts on which such a ruling must rest are undisputed.

" 5. A passenger upon a street car has a legal right that the car shall not merely slow, but shall actually stop in order to allow him to alight from the car, and he has a right to assume that the car will stop ; if, therefore, the passenger, for the purpose of alighting, gets upon the car step while waiting for the car to stop, but instead of stopping it only slows up and then suddenly starts again with a jerk, by reason of which

the passenger is thrown from the car and injured, he is not to be charged with contributory negligence by being upon the step while the car was in motion, for he had a right to anticipate that the car would stop, and there was, in contemplation of law, no risk that the car would start again, either with a sudden jerk or otherwise until he should have alighted."

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The Profession in England and America. Is it overcrowded? —Professor Henry Wade Rogers has written an interesting article upon this question in a recent number of the *Advocate* (Washington, U.S.). He says:—

"We hear much about the overcrowded condition of the legal profession. Not only in this country, but in England, the cry of alarm has been raised, and the question is asked, How are all the young lawyers to live? The young lawyers and the overcrowded condition of the profession seem to have been the subject of a good deal of solicitude for a long time. When John Adams, as long ago as 1757, was contemplating entering on the study of law, he was warned against so doing, and informed that 'the county of Suffolk and town of Boston were full of lawyers.' Edmund Burke, in 1785, speaking of the English colonies in America, declared that 'in no country, perhaps, in the world, is the law so general a study. The profession itself is numerous and powerful.' Not only is the complaint that the profession is crowded an old one, but it seems to be a general one. Complaint is being made in Germany that too many students in that country are studying law. In Germany, until recently, the number of practising lawyers was limited by law to that number which in the judgment of the Court was necessary to transact the legal business of the community. Since this limitation was removed, students have been flocking to the study of the law to such an extent that the Government is now actively exerting itself to discourage them from so doing. The University of Berlin had only 348 students of law in 1860, while in 1881 the number reached 1441 in that university alone. The same complaint is heard in England. The *London Times* talks about the people of England as being 'lawyer-ridden.' And yet England, with a population of over 20,000,000, has only 12,000

lawyers, while the State of New York, with 5,000,000 inhabitants, has 9000 lawyers. The complaint is not made against the legal profession only. It is asserted, too, of the medical profession. There is no country in the world where the proportion of physicians to the whole population is as large as it is in the United States. The proportion is two and a half times greater in this country than it is in some of the great European nations. The legal profession in America has always been numerically weaker than either the profession of medicine or theology. By the census of 1880 the number of lawyers in the United States is given as 64,137, the number of clergymen as 64,698, and the number of physicians and surgeons as 85,671. But the most important fact in this connection is, that while the legal profession is numerically weaker than the profession of medicine and of theology, it has been increasing in numbers during the last thirty years more rapidly than either of the other professions, and out of proportion to the increase in the population of the country. In 1850 there is said to have been one lawyer to 964 people, one clergyman to 864, and one doctor to 569. In 1860 one lawyer to 947 people, one clergyman to 837, and one doctor to 566. In 1870 one lawyer to 949 people, one clergyman to 879, and one doctor to 618. In 1880 one lawyer to 792 people, one clergyman to 775, and one doctor to 585. The number of physicians in the United States in 1880, in proportion to the whole number of people, was not as great as it was in 1850; the number of clergymen was somewhat greater; while the number of lawyers was considerably greater. These figures alone afford no answer to the question whether the legal profession is overcrowded. Has legal business increased in a ratio corresponding to the number of those who do the business? If it has, it is equally distributed throughout the profession, or it is more largely concentrated in the hands of a few, according to the maxim, 'To him that hath shall be given.' It certainly is true that never before in the history of the profession has the practice been more lucrative than it is at the present time. A half century ago a fee of 10,000 dols. was probably unknown. Now cases are frequently tried which involve millions of property, and the fee corresponds with the amount involved. In the cases tried last year grow-

ing out of the wrecking of the Missouri Pacific Railway, the lawyers are said to have received fees amounting to 1,000,000 dols. In the recent Marie-Garrison suit the defenders paid nearly half a million of dollars to their attorneys."

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Professional Confidence.—In the matter of *United States v. Costen*, a proceeding to disbar an attorney on the ground that, after having been employed by one of the parties to a litigation, the employment having ceased, he sought employment by the adverse party, and offered to impart important information, Judge Brewer, in granting the motion, says:—"It is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer's tongue is tied from ever disclosing it, and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do—things that in and of themselves may perhaps be criticised or condemned, when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety, I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession."

* *

Sale of Horseflesh.—The following is the text of the Act of the past session (52 and 53 Vict. cap. 11), referring to the sale of horseflesh as human food:—

AN ACT TO REGULATE THE SALE OF HORSEFLESH FOR HUMAN FOOD.

24th June 1889.

WHEREAS it is desirable to make regulations with respect to the sale of horseflesh for human food:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Signs on Horseflesh Shops.

1. No person shall sell, offer, expose, or keep for sale any horseflesh for human food, elsewhere than in a shop, stall, or place over or upon which there shall be at all times painted, posted, or placed, in legible characters of not less than four inches in length, and in a conspicuous position, and so as to be visible throughout the whole time, whether by night or day, during which such horseflesh is being offered or exposed for sale, words indicating that horseflesh is sold there.

Horseflesh not to be sold as other Meat.

2. No person shall supply horseflesh for human food to any purchaser who has asked to be supplied with some meat other than horseflesh, or with some compound article of food which is not ordinarily made of horseflesh.

Power of Medical Officer of Health to Inspect Meat, etc.

3. Any medical officer of health, or inspector of nuisances, or other officer of a local authority, acting on the instructions of such authority, or appointed by such authority for the purposes of this Act, may at all reasonable times inspect and examine any meat which he has reason to believe to be horseflesh, exposed for sale or deposited for the purpose of sale, or of preparation for sale, and intended for human food, in any place other than such shop, stall, or place as aforesaid, and if such meat appears to him to be horseflesh he may seize and carry away or cause to be seized and carried away the same, in order to have the same dealt with by a justice as hereinafter provided.

Power of Justice to grant Warrant for Search.

4. On complaint made on oath by a medical officer of health, or inspector of nuisances, or other officer of a local authority, any justice may grant a warrant to any such officer to enter any building, or part of a building, other than such

shop, stall, or place as aforesaid, in which such officer has reason for believing that there is kept or concealed any horseflesh which is intended for sale, or for preparation for sale, for human food, contrary to the provisions of this Act; and to search for, seize, and carry away, or cause to be seized and carried away, any meat that appears to such officer to be such horseflesh, in order to have the same dealt with by a justice as hereinafter provided.

Any person who shall obstruct any such officer in the performance of his duty under this Act shall be deemed to have committed an offence under this Act.

Power of Justice with Reference to Disposal of Horseflesh.

5. If it appears to any justice that any meat seized under the foregoing provisions of this Act is such horseflesh as aforesaid, he may make such order with regard to the disposal thereof as he may think desirable; and the person in whose possession or on whose premises the meat was found shall be deemed to have committed an offence under this Act, unless he proves that such meat was not intended for human food contrary to the provisions of this Act.

Penalty.

6. Any person offending against any of the provisions of this Act, for every such offence shall be liable to a penalty not exceeding twenty pounds, to be recovered in a summary manner; and if any horseflesh is proved to have been exposed for sale to the public in any shop, stall, or eating-house other than such shop, stall, or place as in the first section mentioned, without anything to show that it was not intended for sale for human food, the onus of proving that it was not so intended shall rest upon the person exposing it for sale.

Definition of "Horseflesh."

7. For the purposes of this Act "horseflesh" shall include the flesh of asses and mules, and shall mean horseflesh, cooked or uncooked, alone or accompanied by or mixed with any other substance.

Local Authorities for Purposes of Act.

8. For the purposes of this Act the local authorities shall be, in the city of London and the liberties thereof, the Commissioners of Sewers, and in the other parts of the county of London the vestries and district boards acting in the execution of the Metropolis Local Management Acts, and in other parts of England the urban and rural sanitary authorities, and in Ireland the urban and rural sanitary authorities under the Public Health (Ireland) Act, 1878.

Application to Scotland.

9. In the application of this Act to Scotland the expression "justice" shall include sheriff and sheriff-substitute, and the expression "local authority" shall mean any local authority authorized to appoint a public analyst under the Sale of Food and Drugs Act, 1875, and the procedure for the enforcement of this Act shall be in the manner provided in the thirty-third section of the said Sale of Food and Drugs Act, 1875.

Short Title.

10. This Act may be cited as the Sale of Horseflesh, etc., Regulation Act, 1889.

Commencement of Act.

11. This Act shall come into operation on the twenty-ninth day of September one thousand eight hundred and eighty-nine.

Reviews.

Manual of the Local Government (Scotland) Act, 1889. By JOHN CHISHOLM, Advocate, and of the Middle Temple, Barrister - at - Law, and HAY SHENNAN, Advocate. Edinburgh: T. & T. Clark, Law Publishers. 1889.

No Scottish measure since the Education Act has so wide and general an application throughout the country as has the Local Government Act of last session. It is natural, therefore, that already more than one handbook to that Act should have been issued from the press. The work before us is, it is generally understood, the most elaborate of these compilations. It contains an Introduction which sets forth very clearly and tersely the leading provisions of the Act, and the general effect of the changes which these provisions effect. The text of the Act is next given, excellently printed in large clear type, and with elucidatory and explanatory notes and references, the value of which can only be tested by use, but which, on casual perusal, appear careful, concise, and accurate. There is also a very full and valuable Appendix, which contains—

(1) A statement of the business proceedings, powers, and duties of the provisional council, the county council, and the district committees.

(2) A table of all the statutory dates for proceedings temporary or permanent under the Act.

(3) A statement of all the provisions and proceedings in relation to registration and election.

(4) An explanation of the effect of the Act in burghs, with a list of the Scottish burghs and their respective populations and constitutions.

(5) A table of the number of county councillors for the burghs and non-burghal districts of each county.

Finally, there is an Index, perhaps the most important part of a work of this kind, and this appears to be copious and orderly. We have no doubt that the volume will find its way into the hands, not merely of most lawyers, but also of a very large number of county people, great and small, who are interested in the Act, and desire to take a part in the administration of local affairs under the new system. To all such it may be recommended as a clear and accurate guide in the elucidation of the Act. The chronological table, the explanations of the effect of the Act upon burghs, the account of the election proceedings, and the statement of business and powers of the new authorities, are likely to prove specially valuable.

One word of criticism. One cannot but regret that the authors have been purists to a degree in abstaining from all commentary upon the Act. Both politicians, they might be legal dry-as-dusts so far as can be gathered from these pages. One might conjecture from their treatment of the subject that the Act had fallen ready-made from the skies. There is nothing which would lead one to believe that before the Act there was a Bill. We are quite aware that there is a great deal to be said for such a treatment of the subject. But, for ourselves, we hold that the volume would have been of still greater value, especially to the non-legal public, which we trust it will reach, and would have conveyed a more enlarged and just conception of the great problems of local government, of the change which has been effected and the directions in which the new system will develop itself, if the authors had, as they were well able, given some exposition of the principles of the measure, explained the reasons, political, social, and economic, why certain provisions have been introduced, and detailed the important amendments which were accepted and the others which were strenuously pressed but successfully resisted. Some general exposition of the financial aspects of the measure, and a comparison of the comparative value of the subventions under the old system of grants in aid and under the new one introduced by the Bill, would, in our view, have increased the interest and value of the volume. The propriety of the introduction of a good deal of the matter we have mentioned is, however, matter of opinion, and its absence does not detract from the excellence of the manner

in which the work has been performed within the limits which the authors have thought right to lay down for themselves.

The County Council Guide for Scotland: A Handbook to the Local Government (Scotland) Act, 1889. With Introduction, Explanatory Notes, and Index. By J. BADENOCH NICOLSON, Advocate, Counsel to the Scotch Education Department, and W. J. MURE, Advocate, Legal Secretary to the Lord Advocate for Scotland. Edinburgh: William Blackwood & Sons.

MESSRS. NICOLSON AND MURE'S work is much shorter than that which we have just noticed. The appendices in all occupy only fourteen pages, and consist mainly of extracts from statutes likely to be of service to those who have occasion to refer to the Act. The Introduction is concise and clear. Surely, by the way, the learned authors have made a slip in asserting (p. xxi.) that general county business has been carried on *for centuries* by the Commissioners of Supply. True, the Commissioners were appointed so long ago as 1667; but, unless we are much mistaken, they had no business assigned to their management except that of collecting the land tax (and possibly certain matters connected with militia) until a comparatively recent date. The notes to the various sections are useful and well chosen. They are written, perhaps, more from the historical standpoint than the practical. We commend, in this connection, to the careful notice of the antiquarian, the note 5 on p. 15, where the intrusion of the Colorado beetle into our national history is conscientiously recorded. Not unnaturally, too, considering the official position of the authors, the notes seem to indicate a feeling that the statute requires at some points to be treated apologetically. Take, for example, the note on p. 101 to sect. 81, note 14 on p. 38, note 3 on p. 55, note 5 on p. 83, and especially note 2 on p. 121. We think Messrs. Nicolson and Mure have fallen into a serious error in their

third note to sect. 18 (p. 27). The quorum of the Standing Joint-Committee is surely always six (by sect. 18, sub-sect. 1), and does not become three under the Police Act of 1857. The provision in sect. 18, sub-sect. 1, seems clearly to be an express modification of the Police Act. There is an inaccuracy in note 15 on p. 23 in the words "having a population of above 5000." A reference to the statute there in question will show that the criterion is having the population *ascertained* to exceed 5000, and that in the manner prescribed — a very different thing. The notes, however, are with very few exceptions characterized by scrupulous accuracy.

The Law Relating to County Councils: Being the Local Government (Scotland) Act, 1889. With Introduction and Notes, and a Copious Index. By WILLIAM GEORGE BLACK, Author of the "Parochial Ecclesiastical Law of Scotland," etc. Edinburgh: Bell & Bradfute.

THE Local Government Act of this year will not lack exposition. We have this month still a third explanatory edition of it to review. Mr. W. G. Black, who has previously written on cognate subjects, is the author of this last. The work is similar in form to the two which we have just noticed. The Introduction is rather confused in its method. In its language it wants precision—for example, the use of the word "burgh" on p. 2, to include police burghs, is in the teeth of sect. 105, and utterly misrepresents the provision of sect. 11, which it seeks to paraphrase. Mr. Black's notes are excessively meagre, and he has been very parsimonious in his cross references. On p. 96, line 9, "forty-three" ought to be "forty-four," and the wrong chapter is given in the statute quoted on the margin of p. 83. In his first Appendix (at p. 171) Mr. Black erroneously states that the powers of the Boundary Commissioners will expire on 16th May 1892. The correct date is, of course, 5th February 1892.

The Small Debt Amendment (Scotland) Act, 1889. With Notes and Forms. By J. M. LEES, M.A., LL.B., Advocate, Sheriff-Substitute of Lanarkshire, Author of "Sheriff Court Styles," "Small Debt Handbook," and "Handbook of Pleading." Glasgow: William Hodge & Co.

THE preamble to the present amending Act very moderately states that the provisions of the Small Debt Act of 1837 "have been found to be very beneficial," and it further ventures the opinion, that "by certain alterations their utility may be increased." To the first assertion all practitioners will cordially assent, and we should fancy that very few persons will be found who do not also regard as improvements the changes and extensions introduced by this amending Act. As briefly summarized by Sheriff Lees in his Preface, the more important of these are: "Agents are allowed to appear, delivery may be got by direct action, defenders may be convened from adjacent counties, remedy may be got against a party carrying on business within the jurisdiction though domiciled without it, edictal citation may be used, the representatives of a party may be sisted, amendments may be made on the summons, warrant of ejection may be obtained, decerniture for future aliment is authoritatively sanctioned, avizandum may be made, partial extract may be got, and lockfast places may be opened without the expense and delay of obtaining a special warrant." Thus, although the Act is not a long one (of fourteen clauses only), the changes which it introduces are considerable, and an annotated edition of it will certainly be of much service. Sheriff Lees has produced a handy and most useful manual of the Act. His notes are excellent. They strike us as very complete, and are of interest, not only to those who may be concerned in administering the Act, but also to the student of law generally. There is also a valuable Appendix of Forms.

English Decision.

SEPTEMBER.

(All current English decisions likely to throw light upon any point of Scottish law or practice are here reported.)

COMPANY.—*Receiver—Motion ex parte.*—This was a motion *ex parte* on behalf of the holder of fourteen debentures of £25 each in the defendant company, asking that a receiver and manager might be appointed. The company was formed for the purpose of purchasing the business of a photographic dry plate manufacturer, and 160 debentures of £25 each were issued as a first charge on the property, one condition of the debentures being that the company should retain possession of the property until, among other things, the company should by reason of its inability to meet its engagements suspend payment. It was contended for the plaintiff that this event had happened : further, the directors had summoned a meeting for the 24th September with a view to wind-up the company, and that he was entitled to a receiver. *Held*, that the receiver could not be appointed *ex parte*, but leave given to serve notice of motion.—*Ashby v. Samuel Fry & Co. Limited* (Denman, J., sitting as Vacation Judge), 18 September 1889.

All communications for the Editors to be addressed to the care of the Publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Re-opening of the Courts.—The Court resumed its work for the winter upon 15th ult. The opening of the Session was singularly unobtrusive. A general air of languor pervaded the House, and there was every indication that that lull in the business of the Court which has prevailed for the last decade or two still continues. One missed the familiar figure of Lord Mure from the First Division, and fervently wished that fine old Scottish gentleman a cheerful winter upon the genial shores of the southern coast. A still sunnier shore cheers another kindly face that is missed, and the carelessness of Parliament House clerks no longer vexes the soul of worthy James Webster.

* * *

Lord Mure's Resignation.—By the retirement of Lord Mure, the Parliament House has lost its oldest denizen. Born in 1810, he was admitted to the Bar in 1831, and before his resignation he was the senior member of the Bar in active duty. He was Advocate-Depute in 1843, and again in 1852. From 1853 to 1858 he was Sheriff of Perthshire. From

1858 to 1859 he was Solicitor-General, and for a couple of months in 1859 he held the office of Lord Advocate. From May 1859 to January 1865 he represented Buteshire in the House of Commons. In the latter year he was raised to the Bench. Lord Mure was not a brilliant judge, indeed the slowness of his perception often gave an unfounded impression of dulness. But he was an eminently sound and reliable lawyer. He was often the last man to get hold of the point; but, once he got hold of it, he never let it go. Of late years his increasing deafness has somewhat diminished his usefulness, especially as a criminal judge sitting alone, but in the Division he always managed to pick up the drift of the argument; and when the time for advising arrived, it was clear that he had mastered the case. It is paying no small tribute to his sound and careful judgment to record that there was no one upon whose counsel the brilliant head of the Court more relied. In taking his seat upon the Bench at the commencement of the session, on 15th October last, the Lord President said,—“My Lords, since we last sat in this Court we have been deprived, by the resignation of Lord Mure, of the counsel and aid of one of the most able and valued of our colleagues. It is a great loss; but there may be some consolation in reflecting that he leaves behind him nothing but sweet and pleasant memories. It has been his fortune to fill in succession almost all the most prominent offices connected with our profession. As Sheriff, Solicitor-General, and Lord Advocate, he had an opportunity of displaying his talents and capacity; and it may be truly said he made many friends and no enemies. He has been engaged for nearly twenty-five years in the administration of justice as a judge of this Court, much to his own honour and credit, and greatly to the advantage of the public service. He will long be remembered not only for his ability and accomplishments as a lawyer, but also because on all occasions and in all circumstances he proved himself to be a high-minded, upright, and honourable gentleman.”

* * *

Business in the English Courts.—The Long Vacation in the English Courts came to an end on Wednesday, 23rd October.

On Thursday the Lord Chancellor gave his usual breakfast, and the Courts again opened. The state of the business in the Queen's Bench Division at the opening of the Michaelmas Sittings is as follows:—Special jury actions in Middlesex, 262—in London, 46; common jury actions in Middlesex, 266—in London, 31; actions without juries, 419: making a total of actions entered for trial up to the 18th October of 1024. The Divisional Court list of the Queen's Bench Division shows the following business:—In the New Trial Paper, 32 cases; in the Special Paper, 7; in the Crown Paper, 165; in the Revenue Paper, 16; opposed motions, 106: making a total of 326. There are 50 appeals and motions in bankruptcy. In the Probate, Divorce, and Admiralty Division, there are 44 probate causes, 33 to be heard by the Court itself, 9 by special juries, and 2 by common juries. There are 219 matrimonial causes: 133 undefended and 45 defended before the Court itself, 27 special juries, and 14 common juries.



According to a correspondent of the *Times*, the Long Vacation is far too long for Courts with so much work on hand. He writes on 2nd ult.:—"The columns of the *Times* have been lately occupied by numerous letters about 'compulsory games.' Perhaps some space may be afforded to discuss 'compulsory idleness.' Most or all the junior members of the Bar and hardworking solicitors have had their holiday, and would be glad to return to work. Michaelmas Term has begun at one, at least, of our universities, but the Courts of Justice are kept closed for three weeks longer; so the Michaelmas Term is almost a misnomer as applied to the legal sittings. Clients are disgusted with delay, and fees are denied to many members of the Bar who would gladly be earning them. The reason given for such unreasonable and lengthened idleness is that the judges require all this rest. Surely this is nonsense. Fifty years ago the judges used to sit at Westminster at 9 A.M., and stop on till 5 or 6 P.M., if necessary, to finish a cause. Now the Courts do not open till 10.30 A.M., and some of the judges habitually stroll in half-an-hour later. They rise at 4 (sharp), and on Saturdays

at 2 P.M. Such easy hours surely cannot make it necessary for the Courts to be entirely shut for one-third of the whole year. As to the Common Law Courts, it is not far too much to say they are shut half the year in London. I venture to think that this miserable enforced idleness would be upset if only the *Times* would take up the question, for which it would merit the gratitude of the legal profession." The *Law Times* endorses this opinion. It says: "October invariably brings with it the published reflection, that it would be better for practitioners and the public if the Courts could reopen shortly after the public schools and universities get to work again. None but judges desire to be idle in October. Most lawyers are back in town, and to those who have been compelled to fold their hands during the business part of the year, when for a variety of reasons the Courts of the Queen's Bench Division have been shut, the length of the Long Vacation becomes a nuisance and a hardship. We doubt very much whether a Democratic Parliament will see with patience long legal holidays, particularly when following upon partial paralysis of the High Court for a considerable portion of the legal year."

* * *

The Barking of Dogs.—Elsewhere will be found an article upon this subject. It appears that Sheriff Hall holds, that "in ordinary circumstances it is not *per se culpa* to keep or take about a dog which is known to be addicted to barking." This may be the law, but if so, it is a very bad law. The person who takes about a dog which barks at horses' heads is a moral nuisance. It is disgusting to hear a dog barking like to deerve one at the nose of its master's horse; and the pitiful thing is that the master generally seems proud of the idiotic performance. But if it is bad enough to have a dog barking at the nose of its own master's horse, it is positively outrageous when a strange dog takes to barking at the nose of one's own horse. Suppose that in the excitement of sport one fires a shot near the road, one is liable in damages for the consequences of frightening a horse; but it appears that one may with complete impunity take about the roads a hanged cur, which, without provocation, barks and snaps at

the face of every passing horse. Luckily, when there is a chance, the whip is not so merciful as the Sheriff.

* * *

Fortuna fortis adjuvat.—The jurisdiction of the Court of Session to restrain the use of bad Latinity was exemplified the other day in the case of an application by a notary to change his name. The notary's motto was "*Fortuna fortis adjuvat.*" Notwithstanding it appeared that the notary had for years used this motto, the Lord President firmly refused to pass the petition until the Latinity was corrected. "Fortune," said his Lordship, "I have heard described as capricious, unkind, or cruel, but the attribute of 'courageous' is quite inappropriate." It was feebly suggested that "*fortis*" was the object of the verb "*adjuvat*," not an adjective qualifying the subject; but to this the overwhelming answer was, that "*is*" is a nominative termination. Then there was an awful pause, but at last another timid suggestion—prompted, it is whispered, from the reporter's box, and by an old classical prizeman—was made from the Bar, that "*fortis*" was a contraction for "*fortibus*," and that the motto ran "*Fortuna fortibus adjuvat.*" This was the last shot in the locker, and it might have succeeded but for the regrettable circumstance, that "*adjuvo*" takes the accusative not the dative; so there was nothing left but a surrender at discretion, and an alteration of the Petition, so that the motto ran "*Fortuna fortes adjuvat.*" So the matter ended. Pundits maintain that the Lord President was wrong, and that "*is*" is the old way of spelling the terminative of the accusative plural. It was so spelt, it is said, in mediæval manuscripts, and it is so spelt in German editions of the classics. That may be so, but the observation is irrelevant. The termination of the accusative plural of the masculine or feminine of the third declension, as we learned in our childhood, is in "*es*" not in "*is*;" and the practice of all the mediæval monks of Christendom, and all the publishers of the Fatherland, cannot make wrong spelling correct. To argue that though the monks spelt wrong we are justified in spelling as they did, is as absurd as to argue that because the monks taught Pre-Copernican astronomy, therefore we should still adhere to that exploded stellar theory.

The Registration Courts.—The extension of the franchise, whilst it has doubled or quadrupled the business of the Assessors in making up the roll, has nearly killed registration work as a branch of legal practice. Votes are so cheap and so common, that a single one is not worth litigating about. The good old times of three or four days before the Sheriff at Ayr or Peebles belong to the past, and the business of the Registration Appeal Court can be knocked off in an hour. All diminution of legal work is saddening to lawyers, and we doubt if there is here even the consolatory reflection that the curtailment of litigation is *pro bono publico*. We commend to the consideration of politicians whether a vote which is so cheap and so common, that it is not worth the cost of claiming or objecting to, is as likely to be exercised with intelligence, interest, and public spirit, as a vote so highly prized that men fought as keenly for it as for a valuable succession.

* * *

Criminal Responsibility for Shipping Disasters.—The recent Circuit Court at Glasgow was remarkable for three trials for culpable homicide, caused by careless navigation, in none of which was a conviction obtained. In two of the cases the jury seem certainly to have taken a very merciful view of the evidence, and in both these cases the acquittal was by a narrow majority. There can be little doubt that these two last cases were of a character where, before a Board of Trade Inquiry, a master's certificate would have been dealt with; but it is not surprising that juries are slow to convict, of a crime so ugly as culpable homicide, men of respectability, who at the worst have been guilty of no more than recklessness or carelessness, entirely devoid of malice or intention to injure. It seems anomalous that a jury should have no alternative but to acquit such men, or to convict them of the same crime as that of a man who has stabbed or shot another, and escapes by a hair's-breadth from a verdict of murder. Culpable homicide is an awkward and inaccurate expression. Murder is *culpable homicide*, for surely murder is a species of homicide, and murder is culpable. Yet the expression culpable homicide is used to designate a crime carefully distinguished from murder. What we want is a new classification of crimes

causing death; and we might suggest murder in the first degree, murder in the second degree, and fatal recklessness. The last would meet all cases of careless navigation or railway service, reckless shooting, furious driving, and the like, where death has resulted; and under some such name convictions would be much more readily obtained in cases of real culpability.

* * *

The Terry Case.—Both Mr. Justice Field and Nagle, the officer who shot Terry, have been released from custody. Against the Justice there was no shadow of a case. But the case of Nagle raised an important constitutional point, arising out of a conflict between State right and Federal authority. Nagle was a Federal officer, and the alleged offence occurred in the State of California. Did Nagle fall to be dealt with by the State Courts or by the Federal Courts? The Circuit Court of the United States has now held that it “has jurisdiction on a Writ of Habeas Corpus to discharge a United States Deputy-Marshall, imprisoned on a charge of homicide, committed for the purpose of protecting the life of a United States Judge travelling on his Circuit, for the purpose of holding Court, the Deputy having been detailed by the Marshal, under the direction of the Attorney-General, to protect the Judge in his Circuit.” The Court also held that the killing was justifiable under the circumstances, and rejected the contention that when Terry struck the Judge, the Marshal ought to have proceeded to satisfy himself whether the miscreant carried any deadly weapon before shooting him.

Special Articles.

DERRY v. PEEK AND THE LAW OF LYING.

No decision of recent times has been more keenly canvassed than that of the House of Lords on 1st July last, reversing the judgment of the Court of Appeal in the case of *Derry v. Peek*. The opinions of the Peers in that case have called forth a

protest from Sir Frederick Pollock in a vigorous but very confused article in the October number of the *Law Quarterly*, and the decision has been commented upon in almost every law journal published in the English language.

The facts of the case are these. The directors of a tramway company issued a prospectus, bearing at its head the words, "Incorporated by special Act of Parliament, 45 and 46 Vict., authorizing the use of steam or other mechanical motive power," and stating in the body of the prospectus "one great feature of this undertaking to which considerable importance should be attached is, that by the special Act of Parliament obtained, *the company has the right to use steam or mechanical motive power* instead of horses," and further mentioning "the unusually favourable conditions as to motive power open to the company."

In point of fact, the special Act authorized the use of steam power or other mechanical power, only with the consent of the Board of Trade, and subject to periodical renewal of such consent, and also with the consent of two local corporations, and subject to such conditions as they might prescribe. At the time when the prospectus was issued, none of these consents had been formally given. The prospectus and plans of the company had, however, been submitted to the bodies whose consents were required; no objection had been taken to them; and although the directors, or some of them, knew that the consents were required, and had not been formally given, it was held to be proved that they had regarded those consents as assured. In this, however, they were in error, for in point of fact two of the consents were subsequently refused. The question accordingly arose whether the directors were liable in damages on the ground of fraud, in stating that they had obtained authority to use steam without qualifying that statement by setting forth that the authority was subject to the condition of certain consents being received.

Mr. Justice Stirling, before whom the case was first tried, decided in favour of the directors. On appeal, the Court of Appeal (Hannen, Cotton, and Lopes) reversed the decision. On appeal, again, to the House of Lords, a very strong Court (the Lord Chancellor, Herschell, Watson, Fitzgerald, and

Bramwell) reverted to the judgment of Mr. Justice Stirling, and absolved the directors from liability.

Before considering the opinions delivered in the case of *Derry v. Peek*, it may be well briefly to inquire what was the ascertained law of England prior to this decision. The ruling case is that of *Polhill v. Walter*, 1832 (3 B. and Ad. 114, 124). In this case a person had taken upon himself to accept a bill as by procuration, "fully believing that the acceptance would be sanctioned and the bill paid at maturity by the drawee." He expected that his acceptance would be ratified, "and if he had done no more than made a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority that the bill gained its credit, and the plaintiff (a holder in due course), sustained a loss." As it was, the defendant actually had not authority, and knew that he had none: "the representation was untrue to his knowledge;" and although it was found as a fact that he had no fraudulent intention, and there was no contract between him and the plaintiff, he was properly held liable in an action on a count averring that he "did falsely, fraudulently, and deceitfully represent and pretend that he was duly authorized to accept the said bill of exchange."

This case decided that he is liable as for fraud who knowingly makes a false statement, although without intention to defraud, and under a belief that the falsehood is immaterial.

Another important case is that of *Taylor v. Ashton*, 1843 (11 M. and W. 401). There the plaintiff sued certain directors of a bank for false statements contained in a flourishing report, which had induced him to take worthless shares. It was not disputed that these statements were untrue in fact. A jury found a verdict for the defendants, adding "their opinion that the defendants had been guilty of gross and unpardonable negligence in publishing the report." A motion was made for a new trial, on the ground of misdirection, but the Court thought that whatever the addition about gross negligence meant, the jury must be taken to have found that the defendants really believed their statements

to be true at the time of making them; that this negated moral fraud; that moral fraud was essential to the cause of action, and the jury had been correctly told so; and that this being so, there was no good reason for granting a rule for a new trial.

This case established that a man cannot be made liable for fraud in making a statement which he honestly believes to be true, although his grounds for so believing it may not be such as would satisfy a man of ordinary prudence.

A few years later in 1853, Maule, J., took occasion to say (*Reese River Silver Mining Company v. Smith*, L. R. 4 H. L. at p. 79), "I conceive that if a man having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is by law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts."

The result then of the cases which we have examined is, that by the law of England (1) a statement as true of what is proved to be false, no matter how well meant, may found an action of fraud; (2) so also may a statement of something as true of which the party making it has no belief one way or another; but (3) a statement with belief in its truth, no matter how stupid such belief may be, cannot found such an action. If I say that a horse is sound, knowing that it has a blemish which, in my view, is only technical unsoundness, and no real defect, that is fraud; it is fraud, too, if, knowing nothing about the horse, I say it is sound; but it is not fraud if, having been told by the man who sold me the horse that it is sound, I am fool enough to believe him, and to repeat the assurance.

The two former of these propositions have never been disputed, but some doubt has been thrown upon the third. It has been suggested that honest belief does not exempt from fraud, unless that belief rests on some reasonable grounds. If by reasonable grounds be meant grounds which satisfy the man entertaining the belief, the requirement is already met, for in mundane matters, at all events, *honest belief* postulates the existence of grounds which satisfy the mind of

the believer. But it has been suggested that it is not enough that the grounds of belief appear sufficient to the believer, that the test is whether the grounds were such as ought, in the opinion of the Court, to have satisfied a prudent man. The authorities for this suggestion, which has never been made a ground of judgment, except by the Court of Appeal in their now overruled judgment in *Peek v. Derry*, are the following:—(1) A somewhat ambiguous dictum of Best, C. J., in *Adamson v. Jarvis*, 1827 (4 Bing. 66, 73, 74), in which he distinguishes between *knowledge* and *opinion*. (2) A still more ambiguous dictum by Jessel, M. R., in *Hine v. Campion*, 1877 (7 Ch. D. 344, 345), which Lord Herschell construes in the same direction. (3) A dictum of Lord Justice Cotton, in *Weir v. Bell*, 1878 (3 Ex. D. 238, 242), where he says,—

“It is well established, that in an action of deceit a defendant may be liable, not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly,—that is, without any reasonable grounds for believing them to be true, or under circumstances which show that he was careless whether they were in fact true or false.”

This again is ambiguous, because it is not clear from the context whether by “without any reasonable grounds for believing” the Lord Justice means “without any grounds reasonable in themselves,” or “without any grounds which to the man himself appeared reasonable.” (4) A direction to a jury by the Lord President (Colonsay), in *Western Bank of Scotland v. Addie*, 1864 (2 M’P. 809; 3 M’P. 899; rev. 5 M’P. H. L. 81; L. R. 1 H. L. Sc. 145), when he told them,—

“If the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they did not believe, or had no reasonable grounds to believe to be true, that would be a misrepresentation and deceit.”

The same observation applies to this direction as to the dictum of Lord Justice Cotton, viz. that it is not clear in what sense the learned judge used the words, “no reasonable grounds.” What was the test to be applied? Was it,

“Do these grounds appear to us, the jury, to be reasonable?” or was it, “Did these grounds seem reasonable to the directors?” (5) A passage in a judgment of Lord Chelmsford, in the same case, in which he approved of the direction of the Lord President, but to which the same observation applies,—

“Supposing a person makes an untrue statement, which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit.”

It is worthy of note, however, that Lord Cranworth thought the dicta of the Lord President and Lord Chelmsford too broad, for he observed, and the passage is instructive as showing that he clearly appreciated the distinction to which we have pointed,—

“If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true.”

Turning now to the judgment of the Court of Appeal in *Peek v. Derry*, it appears that all the three eminent judges who disposed of that case, concurred in holding that the test of fraud is not the presence or absence of belief, but the reasonability or the reverse of the grounds upon which that belief rests. The old ambiguity, however, adheres to the statement of the law by Lord-Justice Cotton,—

"What in my opinion is a correct statement of the law is this, that where a man wishes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly or without care, whether it is true or false,—that is, without any reasonable ground for believing it to be true,—he is liable in an action of deceit."

But Lord Justice Lopes is quite explicit. He says,—

"If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely on it, and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—(1) If it is false to the knowledge of the person making it; (2) if it is untrue in fact, and not believed to be true by the person making it; (3) if it is untrue in fact and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; and (4) if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

To the first three propositions no exception can be taken. From the fourth the judges in the House of Lords strongly dissented. They held in effect that no action for fraud can be founded upon the statement of what is honestly believed to be true, no matter how erroneous the belief, and how unsatisfactory the grounds upon which it was held, may appear to the Court which judges of the matter. The test is not whether the grounds of belief ought to have satisfied, but whether, as a matter of fact, they did satisfy the mind of the person who has put forth the erroneous statement. No doubt the grounds of belief may be looked at upon their merits as a test of the *bona fides* of the belief. They may be so preposterous that the Court will not take it off the hands of the person who says he relied upon them that his belief was an honest one. No educated man would be heard to say that he honestly believed he could manufacture gold because some one had assured him that gold would be the resultant of boiling electricity in a two-handled stewpan on a gas-stove, and then cooling it in a green refrigerator.

Lord Herschell summed the matter up by holding that nothing short of moral fraud will suffice, and that such

"fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless, whether it be true or false. Although I have treated the (2) and (3) as distinct cases, I think the (3) is but an instance of the (2), for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth."

There can be no doubt that the law as it is laid down by the House of Lords is the law as it has generally been understood, and that so far from innovating upon the law, the doctrine expounded in the Lords checked an attempt at innovation by the Court of Appeal. There is an obligation of honesty upon company promoters who invite the public to subscribe capital: it may well be that there ought to be an obligation of prudence and careful sifting of all statements put forward, but by law there is, in fact, no such obligation, and the Court of Appeal ought to have applied the law.

It may be asked, however—if the House of Lords has only affirmed ascertained law, wherefore all the outcry over the judgment? The truth is that the issue submitted to the Court was a mixed one of fact and law, and there is considerable misunderstanding and doubt as to what was the finding as to the facts to which the law was applied. Sir Frederick Pollock treats the case as if the House of Lords had found that the directors made a statement which they believed to be substantially accurate, but knew to be false in one particular, which particular, however, the directors regarded as immaterial. Now it could have been wished that the finding in fact had been more explicit, but the view taken by Lord Herschell, at all events, was not that which Sir Frederick Pollock suggests. His Lordship said,—

"I cannot hold it proved as to any one of the directors, that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they said was true, and I think that the charge of fraud made against them has not been established."

Whether the evidence in the case warranted such a conclusion

may be very doubtful, but if this was the conclusion, in fact, at which the House of Lords arrived, *Derry v. Peek* may have been wrongly decided, but for all that the judgment does not embody bad law.

The truth is, it is often hard to draw the line between falsehood and the mere absence of pedantic accuracy. When A. B., having received the Queen's letter, but having not yet passed his trials, says, "I have obtained the vacant seat on the Bench," nobody accuses him of falsehood. It would be sheer pedantry for him to go about affirming, "I have obtained the vacant seat upon the Bench, subject to the condition of my passing certain trials before the Court." So, again, I obtain an appointment conditionally upon my passing a medical examination. I have not the least doubt about passing it, being convinced I am as sound as a bell. I meet a friend, tell him I have got the appointment, and ask him for a loan of £50 to buy an outfit. I do not mention the medical examination; I cannot honestly say afterwards that I had forgotten it, but the truth is, I attach no importance to it, and it does not occur to me to mention it, any more than to inform my friend that the letter of appointment was written on blue paper. *This is not fraud.* But, on the other hand, if I reason thus: "Of course the medical examination is a mere matter of form; I have not a shadow of a shade of a doubt about passing it, but my friend may have some cranky notion about it; he may picture my heart as being as big as a pumpkin, or fancy I am in the last stages of kidney disease. No; I had better say nothing to him about the medical examination." *This is fraud.* One other illustration, coming very near the matter in hand. Company promoters have passed a Bill successfully through all its stages in both Houses of Parliament. The measure merely awaits the royal assent, but, being in a hurry, they issue a prospectus, setting forth that they have obtained an Act embodying certain provisions. This may be bad taste, but it could not found an action for fraud. The law being as we have explained it, we may assume that the view taken by the House of Lords in *Derry v. Peek* was that in the opinion of the directors when they issued their prospectus, the necessary consents were as assured as is the royal assent to a private Bill which has

passed through both Houses. The case could not have been decided as it was if the House had been of opinion that the directors failed to qualify the statement in their prospectus in the hope that the absence of any qualification would induce the public more readily to subscribe. They must have been satisfied that the directors did not qualify their statement because, in their state of mind, such qualification would have appeared a piece of unnecessary pedantry or prolixity.

It is interesting, and in one way gratifying, in another humiliating, to note that the result at which the House of Lords has arrived is in conformity with the opinions of the two judges of the Scottish Courts of greatest authority in matters of contract and company law, and that neither of these opinions were referred to in the English Courts or in the House of Lords. In *Brownlie v. Miller*, 1878 (5 R. 1076, 1091), Lord Shand said, in reference to one making an erroneous representation,—

“If he have refrained from making inquiries which would have disclosed the truth, it may often be a legitimate inference that he did not believe in the truth of his assertion. But if he refrained from inquiry, not from any unwillingness to know the truth, but because he was really satisfied he had reasonable grounds of belief, and his belief be thus honestly entertained, I do not think his statement, though false, can be held to be fraudulent in law, as it certainly is not in fact.”

Lord President Inglis spoke in precisely the same sense in *Lees v. Tod*, 1882 (9 R. 807, 853, 854),—

“If they (the directors) make the statements in the *bona fide* belief that they are true, they are not guilty of fraudulent misrepresentation merely because, in the judgment of the Court or of a jury, they had not reasonable—which I understand to mean sufficient—grounds for believing the statements to be true, for this would be to make them answerable for the erroneous inferences which they drew from the facts within their knowledge, which is only an error of judgment. . . . The legal proposition which I desire to state will apply to no man who has not a *bona fide* belief in the truth of the statement. But, if there be such belief, then, in my opinion,

there is no occasion to refer to the sufficiency or insufficiency of the grounds of that belief, unless these be so slender or flimsy as to destroy the idea of *bona fides*."

It remains only to add a word of caution against supposing that anything that has been written above, or anything that was decided in *Derry v. Peek*, applies to questions of rescission of contract and restitution. That branch of the law is governed by totally different rules and considerations. When a contract has been induced by misrepresentation, however innocent, and rescission is possible, an action for rescission and restitution will lie against the contracting party who made the misrepresentation. But in such a case as *Derry v. Peek*, rescission is impossible, and the action is one, not of rescission of contract, but of damages for fraud or deceit.

THE BARKING OF DOGS.

DOGS have always been a fruitful source of trouble both to the Legislature and to the Law Courts. They have had Acts of Parliament and the energies of statesmen devoted to them. They also claim the special attention of the civil authorities and the guardians of the peace, during a certain period of the year popularly known as "the dog days." They have formed the bone of contention in many an action, and they have even figured as witnesses in what may be termed their own cases, and been the means of very speedily settling the matter in dispute. This was very forcibly demonstrated in one such case recently tried in an English County Court, where the question raised was as to the ownership of a dog, and upon the dog itself being brought into Court it very soon, by its lively demonstrations of delight, settled the difficulty as to its rightful owner. The presiding judge, although he had heard the evidence of several witnesses, went so far as to say, that "he believed the dog, which could not lie, rather than the witnesses—witnesses often perjuring themselves;" and truly no cases are so productive of "hard swearing" as those that are known as "dog" and "horse cases."

The most general class of actions in which dogs are concerned are, however, those dealing with claims for damages

against the owners of the dogs in consequence of injuries caused through their biting or worrying; and such cases are nowadays by no means few.

But the interesting question has just been raised, whether the owner of a dog is liable for injuries resulting through the dog simply *barking*. This question does not seem to have been hitherto before the Courts. It came up, however, recently in a Small Debt action in the Sheriff Court of Ayrshire, before Mr. Sheriff-Substitute Hall, in the case of *Young v. Cameron*, 27th June 1889, which was an action for damages for injuries to the pursuer's horse, alleged to have been occasioned by a dog belonging to the defender. The "leading facts" of the case are stated by the Sheriff-Substitute in his interlocutor to be—" (1) That the dog ran at the horse, or at the dogcart in which the pursuer was driving, and barked furiously, but did not bite the horse; (2) that the horse was a young horse, rising five years, but generally quiet and free from nervousness; (3) that the immediate cause of the injury was the step of the dogcart by which the horse's foot was caught when it struck out, and the position of which the pursuer has had altered since the accident."

In this case it was not proved (though stated in the claim) that the dog was of a vicious disposition. The pursuer did not rest his claim on any previous vicious propensity on the part of the dog. His contention, founding upon the Act 26 and 27 Vict. cap. 100, was, that if a dog did do injury, its owner was responsible therefor, whether there had been such a vicious propensity to do injury or not. But this can scarcely be said to be a correct statement of the law, as in general it is necessary to the success of an action to show, not only that the dog was of a vicious disposition, but also that this was within the knowledge of its owner. The then Lord Justice-Clerk (Moncreiff), in the case of *Burton v. Moorhead*, 1 July 1881 (8 R. 892), thus very clearly states the law upon this point: "It seems agreed that where an owner of a dog has no reason to suppose that it is ferocious, the mere fact that it has turned out to be so would not make him liable for anything it has done; the dog has, in fact, the privilege of one worry." In further support, however, of the above contention, and its applicability to the action being

tried, the English case of *Wright v. Pearson*, 1868 (L. R. 4 Q. B. 582), was cited, and also to show that horses were included under that statute, as being comprehended within the meaning of the term "sheep and cattle." The Act referred to deals, however, with a special class of injury by dogs, namely, that of sheep-worrying, and in the case of *Wright v. Pearson* the dog was proved to have run at the pursuer's mare, and to have *bitten* it on the leg, causing it to kick out, from which the most serious part of the injury resulted. The owner of the dog was therefore held liable, because, as stated by Sheriff Hall in his interlocutor in dealing with this point, there had unquestionably been an injury done by the dog, of which what subsequently happened was the direct and natural consequence. But in Young's case it was not contended that the dog had bitten the horse. The only allegation was that it had run at the horse, or at the machine, barking violently, and this was attempted to be shown to be equivalent to its having bitten the horse. The Sheriff-Substitute could not, however, accept this view.

It is, indeed, part of the very nature of dogs to bark. They seem to take a special delight in it; and it is a well-known fact that they have a tendency to bark at the spinning of wheels, whether these are in vehicles or elsewhere. This arises, no doubt, from the excitement caused by the revolving of the wheels; and the quicker the revolution, the more violent is the barking. But while it has been decided, in effect, that a dog shall only be allowed one bite with impunity, and without mulcting its owner in damages, yet no limit appears, up till the present, to have been put upon the amount of barking that it may indulge in. No doubt such conduct on the part of a dog may be extremely irritating and annoying; but can any restriction be put upon it? The finger of stern fact would rather seem to point in an entirely opposite direction, for only recently the worthy pastor of one of the towns in "the kingdom" of Fife is reported to have been "compelled to leave his manse for a month on account of the nuisance of a neighbour's dog, whose persistent barking and howling made study impossible;" the Police Commissioners, upon being appealed to, having declined to interfere in the matter.

Had it been possible to hold the owner of a dog responsible for injuries resulting from its barking at passing machines or horses, it is surely a very strange circumstance that there should have been no reported case in which the question has been tried and the owner found responsible. This is more especially the case looking to the large number of dogs that are to be found in the different parts of the country, and the frequency with which accidents, of which they are the cause, occur. On the contrary, everything points to the owner of the dog being free from responsibility in such cases, and this seems to be the view taken by Mr. Sheriff-Substitute Hall in Young's case, for in his interlocutor disposing of the case he says, "As I understand the law, I am not prepared to hold that, at all events in ordinary circumstances, it is *per se* culpable to keep or take about a dog which is known to be addicted to barking;" and at the close of his judgment he adds, as summing up the whole question, "Here, if I were to decide in favour of the pursuer, I should certainly be carrying the law a step further than was done in *Wright v. Pearson*; and I am not disposed to take that responsibility upon myself in a Small Debt case, where there is no appeal open to the unsuccessful party. I am quite aware that a barking dog is not only a great annoyance, but a source of positive danger to persons driving. As the law stands, however, I am under the necessity of holding that, unless there is fault on the part of the owner, it is one of the risks of the road which such persons must be prepared to meet;" and he accordingly assolizied the defender.

The result seems to be, therefore, that, provided there is no fault proved on the part of the owner, a dog may with impunity indulge in barking to its heart's content; and no matter how serious an injury may be caused through such barking, yet as long as the dog keeps to "barking," and does not "bite," its owner is in the happy position of being free from responsibility. "Its bark" in that case is not so bad as "its bite." To those who indulge in the luxury of keeping dogs such a state of affairs may be something of a boon, but to the unfortunate person upon whom the injury caused falls it is far from being a matter for congratulation. B.

*WIDOWS' FUNDS CONNECTED WITH THE LEGAL
PROFESSION IN SCOTLAND.¹*

It has lately occurred to me to bring under the notice of the Society the desirability of including within its benefits a properly constituted Widows' Fund. By a properly constituted Widows' Fund I do not mean a benevolent institution such as those already in existence, which I understand to be benefit societies for relief in necessitous or distressed circumstances. Of these there are admirable examples in the Law Association and the Solicitors' Benevolent Institution; but the Widows' Fund I have in view would not, I believe, interfere, directly at least, with such benevolent societies. I point rather at a mutual system of annuity insurance, by no means competing, or competing only to a limited extent, with the established life insurance companies. An institution of this kind provides to the widow of any member, being a contributor to the fund, whether rich or poor, an annuity secured beyond the reach of her creditors, and beyond her own control, which, whatever may be her vicissitudes, would enable her to live with decency becoming the widow of a professional man, or, at any rate, would remove her from apprehension of actual want. We must all have had occasion to observe how unwilling right-thinking persons are to apply anywhere as being in distressed or necessitous circumstances, and that much hardship is occasionally voluntarily suffered in preference to making an application and disclosing the state of affairs. In Scotland, such Widows' Funds have been connected with associations of professional men, and particularly men of the legal profession, for more than a century, and I think I do not err when I say that the benefits which they have conferred upon the learned professions have been great and varied. Apart from the actual benefit to the surviving widow, they form a link or bond, which, like our Society itself, binds closer the various members of the professions affected, for improvement, protection, and defence of interests. I am therefore tempted to mention how it has fared with professional bodies in Scotland who have formed

¹ A Paper by Mr. A. P. Purves, W.S., read at the Annual Meeting of the Incorporated Law Society at Leeds.

such institutions, and especially where such institutions are directly connected with the legal profession.

1. *Writers to the Signet Widows' Fund*.—The Writers to the Signet are the most ancient body of solicitors in Scotland, dating, it is said, from before the institution of the Supreme Court of Scotland, the Court of Session, in 1532. They derive their name from having had granted to them by the Crown the right to “expede”—i.e. prepare and pass all writs for the commencement of actions in the Supreme Court of Scotland, and all titles flowing from the Crown, the fountain of feudal right under the conveyancing system of Scotland. These privileges are now practically annulled, and the other bodies of solicitors I have mentioned have nearly the same rights and privileges as Writers to the Signet. The number of members of the Society varies from 400 to 500, generally a little over the former figure. By a special Act of Parliament obtained by the Society in 1805, the Widows' Fund which I am about to describe was constituted. By that Act it was made compulsory on all persons becoming apprentices, or articked clerks, or members of the Society, after 1805, to contribute to the Widows' Fund; and under the Act as modified by subsequent statutes the following payments are exigible from each person becoming an apprentice, or articked clerk, or a member:—(1) On becoming an articked clerk, £50. (2) On becoming a member on fulfilment of apprenticeship, an age tax of £6, 6s. for every year of the member's age above twenty-four. (3) On marriage, a marriage tax of £10. (4) On marriage, an equalizing tax of £3, 3s. for every year which the age of the member exceeds the age of his wife. (5) Annually after admission as a member, a contribution of £6, 6s. The Act, which is declared a public Act, provides that the annuities to widows shall not be assignable by them, nor attachable by their creditors, nor subject to the *jus mariti* of any future husband, nor affectable by his debts and deeds. This provision prevents any sale of the annuity by the widow, or any attachment by creditors for her debts or those of any husband she may marry. The number of members of the Society contributing to the Fund is at present 419, and the number of widows receiving annuities is 149. For many years the amount of annuity was £90, but latterly, in conse-

quence of the low rate of interest obtained on first-class securities, it has been £80. The amount of funds invested is £231,900.

2. *Solicitors before the Supreme Courts Widows' Fund.*—

This Society was incorporated as a body of legal practitioners by Royal Charter in 1797, and the Widows' Fund constituted in 1817. By a special Act of Parliament regulating the whole affairs of the Society, passed in 1871, the Widows' Fund was reconstituted, and entrance to it made compulsory on all future entrants to the Society. The payments are:—

(1) An entry money of £35. (2) An annual rate of £6, 6s. (3) An age tax: if on becoming a contributor the age is above twenty-five, and if married, for each year the age exceeds twenty-five, £5, 12s. 6d. (4) On marriage, a marriage tax— if the age shall exceed twenty-five at the date of admission, for each year £5, 12s. 6d., with interest at four per cent. to the date of marriage. There is a provision that, in the event of there being orphan minor children of a contributor but no widow, the annuity which would have been payable to the widow shall be paid to the children until the youngest child attains twenty-one. In the Act of Parliament there is a clause protecting the annuities from creditors and future husbands. The number of contributors to the Fund is 104, and there are twenty-nine widows and two orphan families receiving annuities. The capital of the Fund amounts to £52,000.

3. *Advocates' Widows' Fund.* — The Advocates' Widows' Fund was established by special Act of Parliament in 1830. The scheme is a compulsory one, and provides for three classes of contributions, and consequently three classes of annuities. The contributors must be members of the Faculty of Advocates, or hold judicial office in Great Britain, in Ireland, or in the Colonies. The payments are:—(1) Entry money, £50. (2) Annual rates for first-class annuities while a bachelor, £2, 15s. (3) When married and ever after, £3, 17s. (4) Age tax, payable for every year the member is above twenty-four at admission—Class I., £6, 12s.; Class II., £8, 16s.; Class III., £11. (5) Marriage tax—Class I., £15; Class II., £20; Class III., £25. (6) Equalizing tax for each year a wife may be more than five years younger

than her husband, varies according to the age of the husband. The number of contributors to the Fund is 309, and of widows receiving annuities, 73.¹ The amount of first-class annuity (the smallest given) is £66. The assets invested to secure these annuities amount to £184,000.

From what has been said, it will be seen that the joining of the Widows' Funds is compulsory on all entrants to the Societies which have been named. Originally, however, all the Societies seem to have instituted their Widows' Funds as voluntary associations, but, finding that, even with small numbers, such associations conferred benefits on their members, they, with apparently wonderful unanimity, agreed to make entrance compulsory, and obtained powers from Parliament to that effect. In obtaining these powers the Societies must have satisfied the Committees of the Houses that the results were beneficial to the members, and it may be said that, on this point, no dissentient voice is heard among the members of the Societies themselves. All appear to regard their respective Widows' Fund as important and beneficial, and, except in the case of members who have become bankrupt or who have gone abroad, there are few arrears in the contributions. The number of members or contributors to each of these three Widows' Funds varies from 400 in the case of the Writers to the Signet, to only 100 in the case of the Solicitors before the Supreme Courts. At first sight these are small numbers to which to apply the principles of endowment involving life insurance; because, as a general rule, these principles are supposed only to be applicable to cases where lives are dealt with in considerable numbers. The experience of these Widows' Funds appears to be that considerable numbers are not required to spread the life risks in such cases. "The theory of such a Fund" (says Mr. John M. McCandlish, the able actuary and manager of the Scottish Union and National Assurance Company, in reporting on the Writers to the Signet Fund), "is that every man who enters it, and for whose possible widow due provision must be made,

¹ It seems odd that, whilst the Writers to the Signet are to the Advocates as 4 to 3, the widows of the former are to those of the latter as 2 to 1. The explanation probably is, that advocates generally marry young or not at all.—Eds. *J. of J.*

brings with him contributions which are the exact equivalent of the liabilities involved. However few or however many may be apprentices and entrants, the scale of contributions ought to be such as to ensure that each person admitted to the benefits of the Fund pays his own way." Again he says: "An unexpected number of exceptionally early deaths might take place among any body of men, but such an occurrence would have a more disturbing effect among a smaller than among a larger body. The members of this Fund, however, are still numerous enough, especially having regard to their social and professional position, to warrant the expectation that there will be no great disturbance of the results now anticipated and provided for." From his report it would appear that the lives of solicitors may be to some extent regarded as selected lives, which may be anticipated not to fall in quite so early as average lives. Curiously enough, also, the actuary states that the lives of widows of contributors, according to the experience of the Fund, are longer than average lives, and in his calculations he provides for this by taking the English life table, and "by reckoning each female life as of an age three years less than her actual age. In other words, he estimates that the wives and widows of Writers to the Signet will, one with another, live as long as the average of women of the whole population of England three years younger." It would appear, therefore, that, whether from the fact that the lives of solicitors may be regarded as selected lives (although this ought, in some degree, to be neutralized by the superior longevity of the widows) or from compulsory entrance, which, as sweeping in bachelors and widowers, must have undoubtedly some effect, or from the care of investment (no part of the Writers to the Signet Fund having ever, during more than eighty years' management, been lost), such societies, even with small numbers, yield satisfactory results. Similar Widows' Funds have been long in active and prosperous existence in connection with the clergy of Scotland, and the members of the Royal College of Physicians of Edinburgh and the Royal College of Surgeons of Edinburgh. I do not trouble you with the figures of these, but I believe these Widows' Funds have also been successful. The importance of the enactments by which

the annuities from such Funds are secured as an alimentary provision to the widows, and are declared not attachable by creditors or future husbands, is very great, because they place it beyond the power even of the recipients of the benefits of the Fund to frustrate the intentions of the donors. It may be easily imagined that the existence of these Funds, and the certainty of some provision for widows of members of the profession, has a considerable influence in maintaining the status of the profession. I do not know whether the subject of instituting such Funds has ever been before the Society, or whether provincial legal societies in England have formed such Funds. It appears to me that, having regard to the advance which our Society has made in recent years, it is well worthy of careful consideration whether such a Fund should not be formed in connection with the great Society of which we are members, on the lines which I have sketched, or on the broader, and possibly more enduring, lines which the numbers and influence of the Society would give scope for. I am aware that since these Widows' Funds were instituted, the facilities for obtaining annuities from ordinary life assurance companies have been greatly increased, and many advantages are now conferred by recent statutes on the holders of such. I think, however, sufficient advantages, *e.g.* the facts of solicitors' lives being to some extent select lives, and the absolute protection from creditors, remain to render desirable such a mutual assurance society as I have proposed. It need not be compulsory. Actuarial adjustments, attractive to younger members, but not unfair to any, could be made so as to render the Fund so desirable that, from a large Society like ours, a sufficient number of contributors would be certain to join.

THE PREVENTION OF CRUELTY TO CHILDREN ACT.

Punishment for Ill-treatment or Neglect (sects. 1, 2),

SECT. 1 of this statute, which has just passed into law, provides that any person over sixteen years of age, who, having the custody of a child (being a boy under fourteen or a girl

under sixteen), wilfully ill-treats, or neglects, etc., such child "in a manner likely to cause such child unnecessary suffering or injury to its health," shall be guilty of a misdemeanour. The punishment, on conviction on indictment, is £100, or imprisonment not exceeding two years; and, on conviction before the magistrates, £25 or three months' imprisonment. The imprisonment, in either case, may be with hard labour, and may be awarded without the option of a fine or in addition to that penalty. By sect. 2, if a person so convicted on indictment knew that he would obtain money on the child's death, the fine may be increased to £200.

Restrictions on Employment of Children (sect. 3).

Any person who causes (a) a child, being a boy under fourteen or a girl under sixteen, to be in any street for begging, whether under pretence of singing, etc., offering anything for sale or otherwise, or (b) a child of like age to be in any street or licensed premises (other than those for public entertainments) for singing, etc., or offering anything for sale between 10 P.M. and 5 A.M., or (c) a child under ten to be at any time in any street, licensed premises, premises licensed for public entertainments, circus, etc., for singing, etc., or offering anything for sale—shall be liable to a fine of £25 and three months' imprisonment. Local authorities (*i.e.* for the city the common council, for the county of London the county council, for boroughs the council, and for any other place in England the sanitary authority, see sect. 17) may by bye-law (see sect. 13) extend or restrict the hours mentioned in sub-sect. (b). Also, licences to employ children over seven and under ten in public entertainments, etc., may be given by the Petty Sessions, or in Scotland by the School Board; and the provisions of sub-sect. (c) against employment of children under ten in such entertainments, etc., shall not come into force until the 1st November 1889. This section is not to affect the Education Act, 1876.

Protection and Disposal of Child (sects. 4, 5).

A constable may apprehend, without warrant, any person whom he sees committing an offence under the Act, if he

cannot ascertain such person's name and address. A constable may take to "a place of safety"—which phrase includes the workhouse (sect. 17)—any child treated with cruelty or neglect (sects. 1, 4), or caused to beg in the streets (sects. 3 (a), 4). The child may be detained, but usually the person apprehended without warrant may be bailed (sect. 4 (2)).

Where a person having the custody of a child, being a boy under fourteen or a girl under sixteen, has been (a) convicted of an offence under sect. 1 of this Act against such child, "or any offence involving bodily injury to the child and punishable with penal servitude," or (b) "committed for trial for any such offence," or (c) bound over to keep the peace toward such child, *any person* may apply to a Petty Sessions, which may order that the child be taken out of its present custody, and committed to the charge of a relation of the child "or some other fit person named by the Court." "Provided that no order shall be made under this section unless a 'parent' of the child is under committal for trial for having been, or has been proved to have been, party or privy to the offence, or has been bound over to keep the peace towards such child" (sect. 5 (1)).

It should be observed that in this Act the "parent" includes guardian, and every person who is by law liable to maintain the child (sect. 17). One effect of the proviso, therefore, is that where a child is boarded out, and the cruelty or neglect is due to the person who is "taking care" of it, the child cannot be handed over under this section unless the parent has been at least "privy" to the cruelty or neglect.

The person so adopting the child will be responsible for its maintenance, etc., though the parent may be ordered to contribute as under the Industrial Schools Acts. The Court shall, if possible, select a person for custodian, who is of the same religion as the child, and may supersede a person appointed of a different religion. Where the custody order has been made because some person has been committed for trial under sect. 5 (1), (b), the parent is not to be ordered to contribute prior to the trial, and if the person is acquitted, the custody order will cease (sect. 5 (2)). A Secretary of State may discharge a custody order and may make rules (sect. 5 (3)). The parent cannot claim the child (sect. 5 (2)).

Search (sect. 6).

A stipendiary or two justices, on information on oath, by person acting in the child's interest, that there is reasonable cause to suspect that a child is being ill-treated or neglected within their jurisdiction, may authorize any person to search, and if the child is found to have been ill-treated or neglected as aforesaid, to detain it in a "place of safety," and then it may be dealt with as under sect. 4. One justice may act in case of urgency (sect. 6 (1)). The person searching may enter by force (sect. 6 (3)). The warrant is to be executed by some inspector or other superior officer (sect. 6 (4)).

Evidence and Appeal (sect. 7).

The accused person and the husband or wife of such person are competent but not compellable to give evidence.

THE WRITING ON THE WALL.

V.

A FEW months later Binks took advantage of the February recess of the Court to visit St. Andrews, where he looked for a day or two's golfing. But the Fates were against him, for on the very evening of his arrival in the ancient city a heavy fall of snow set in, and next morning the Links were unplayable even with red balls. Binks spent the forenoon loitering about the Club and gossiping in Tom Morris' shop. But in the afternoon, resisting an invitation to make one in a whist party, he determined to gratify his long-cherished wish to visit Strathkinnes; and accordingly he set out past Rathelpie for that village. A walk of an hour, past Mount Melville and across Magus Moor, brought him to Strathkinnes, a long row of red-tiled cottages, scattered and scrambling up the slope of a well-cultivated hill. Binks had a vague recollection that his old schoolfellow had lived near the far end of the village, but he did not know the house. Accordingly he entered a small shop, "licensed to retail teas, tobaccos, and ale," and made inquiries about the house formerly occupied by the Widow M'Ara.

"Ye'll be goin' to tak' the hous' yersel'," said the obliging shopwoman.

"Indeed, is the house to let, then?" asked Binks.

"Ay, and hes been this mony a day; but eh dear me, it'll need a heap dune till't afore it's fit for a body to live in."

It was with some difficulty that Binks got the good woman to restrain her garrulity, and it was not until he had broken the thread of her discourse by purchasing three pennyworth of sweets that he was able to induce her to come to the door of the shop, and point out the house he was in quest of.

Mrs. M'Ara's house was a two-roomed cottage, about fifty yards back from the road, with a garden, or what had once been a garden—now it was all covered with a very dirty turnip crop—in front. Nailed to the outer gate was a board with a now hardly legible inscription, "House and garden to let. Apply to D. Balsillie, joiner."

A smooth line of snow up the centre of the garden ground indicated what had once been the walk up to the house; and passing through the gate, which was not locked, but only tied with a rotten piece of cord, Binks approached the cottage. He found the door locked and the front windows shuttered up with outside shutters, so he went round to inspect the back of the house. There he found a small grass plot, with one or two rotten washing-poles, where the old washerwoman had been in use to dry her clothes. Against the cottage wall, on one side, was a dilapidated pigstye; on the other side there was a rusty boiler, sunk amidst ruined brick-work. There was no door at the back of the house, but close to the boiler there was a small window. Like the front windows, it was shuttered up; but, unlike the front windows, it was completely screened from view. Binks looked carefully about to see if anybody was looking, but he saw nothing living in sight except a covey of partridges, looking very miserable among the snow. Then this distinguished lawyer, who, two nights before, at a political meeting had gassed for half-an-hour about respect for the law as a necessary condition of civilisation, and denounced with indignant horror any proposal to make law-breakers law-makers, seized the shutter and tore it down. Several of the window panes were cracked, but for a wonder none of them were broken, and the window was bolted down. Binks smashed a pane with his walking-stick, passed his hand in and unloosed the catch. Next, he tried to pull down the upper sash, but the window evidently opened only from below, and

when he got the lower sash open he found that he had to hold it up, as, like all old windows, it was not hung. It is nature to climb through a narrow aperture head first, but, had Binks been prudent, he would have disregarded nature and gone through the window, which was small and narrow, feet first. But Binks was not prudent, so having climbed up on some bricks, for the window was from five to six feet from the ground, he got his head through first, and proceeded to draw his shoulders and body through after it. It was a gingery business, for there was only a narrow ledge on the inside on which to gather up his body as he got it through, and he had to keep up the sash all the time. All was going well, however, and Binks was just drawing his legs through, when a bat fluttered in his face. He let go the sash to brush it away. the sash fell, his other hand slipped from the sill, and in a moment Binks was hanging head downwards in the room, his feet caught by the sash and his nose bleeding. What a horrible death! At least so thought Binks, when he realized the situation. It was no use to shout, for nobody could hear him. It was no use to try to staunch the bleeding, for how could a bleeding of the nose be staunched whilst hanging by the heels? It remained only to say his prayers, and as the dying lawyer raised his face, his eyes, growing accustomed to the gloom of the interior, detected shelves upon the wall right up to the window from which he hung. Without waiting to finish his devotions, Binks clambered hand-over-hand up to the level of the window, then, clinging to a shelf with one hand, he released his feet with the other, and in a moment he was standing upon the cottage floor, drying up the bleeding and muttering, "Well, upon my word!"

A glance round satisfied Binks that he was in "the room," or "ben the house." The floor was littered with dirt and rubbish, and in the apartment there was no furniture except a broken chair, which apparently nobody had thought it worth while to take away. The press, he recollected, according to Cooper, was between the fireplace and a window.

Yes, there to be sure it was, between the hearth and the small window by which he had entered. When he had stopped the bleeding and drawn himself together, Binks turned to the press. It was locked, but the key was in the lock, and he opened the

door. The cupboard was about three feet square. There were two shelves at the top, and below them there were pegs for hanging clothes. It was with difficulty that Binks could make out this much in the uncertain light, but he had prudently brought a candle with him. Having lighted this he next proceeded to search the press for the lost ring. He examined the two shelves carefully first, but found nothing there except two dead mice, a bit of rag, and a bone button. On the floor there was nothing but a thick coating of dust and a few rusty nails. Binks looked carefully for clefts or crannies. It was long ere he found one, but at last his diligence was rewarded. At the back, midway between the two shelves, he discerned a small fissure in the plaster; it seemed the only thing of the kind in the whole press, and he eagerly leant across to explore it with his toothpick. The fissure was small and narrow, and one scoop with the toothpick robbed it of its coveted treasure—a black beetle! which fell sprawling upon the shelf beneath.

“Well, I’m blown!” This was all that Binks said when his search was completed, for Binks was not a man of many words. But the circumstances were so aggravating that they might well have excused even a stronger expression of opinion. To have tramped four miles through the snow, torn down the window-shutter, clambered through the window, skinned his ankles, broken his nose, and rummaged through all the dirt and dust of that desolate press, and to be rewarded by a black beetle! It showed the folly of lending an ear to superstitions—the infinite folly of listening to the superstitious fancies of a maniac!

The best thing now to be done was to get out of the hovel as quickly as possible. This time Binks was more careful in his negotiation of the window. He propped up the broken chair against the wall, and drew himself carefully up. He would have gone feet first this time, but he had not room to turn his body on the narrow sill and no leverage to swing himself up. So he got his head and shoulders through first, and then he paused for a moment to draw breath. The day had improved wonderfully during the last half-hour. The evening sun had come out, lit up the western hills with fiery splendour, and tinged with a brilliant glow the scattering

corners of the snow clouds which had brooded over the landscape throughout the day. The partridges had plucked up courage, and were moving off to two stacks in the corner of the field; a hare was scampering over a neighbouring plough towards a field of turnips; and on a bush at the foot of the green, a blackbird was busy making a supper of haws. The picture had an exhilarating effect upon Binks after the squalor of the interior, and he settled down upon his elbows to drink it all in.

"Hulloa, do you live here?"

Unobserved by Binks, whose eyes were on the sunlit Lomonds, a stranger, treading lightly on the soft snow, had rounded the corner of the house, and stood before him,—a short, wiry, sunburnt man, in a loose golfing jacket and knickerbockers. He was looking with the cool nonchalance of a man whom nothing will take aback, at the figure at the window above, and certainly it was well worth looking at. Binks was leaning forward upon his stomach, his elbows planted upon the sill, the window sash resting upon his back, his nose was much swollen, his face was smeared here with blood and there with dust and soot, for whilst rummaging the press he had been constantly feeling his face to make sure his nose had not begun bleeding again. The stranger, however, had met his match in coolness, for, without moving a muscle, Binks calmly replied,—

"No; do you?"

"Hardly," replied the stranger; "but I had a fancy to take a look round the place."

"Well, as I was here first, you will perhaps allow me to do the honours. Won't you come in?"

"Yes; if you will kindly open the door."

Binks explained that it was not in his power to do so, and suggested that the stranger, who stated his name as Captain Hunter, should go along to Mr. Balsillie's for the key.

"But in that case," continued Binks, "you will excuse my waiting, as I have no relish to meet a charge of house-breaking."

"Blow Mr. Balsillie!" replied the Captain; "if you got in through the window, surely I can. Come, clear the course."

Binks, having advised the Captain to be careful, and

warned him that the window was not hung, withdrew to allow the stranger to enter.

"Well, I don't care to put my head under a guillotine," said Captain Turner. "The wood's rotten; I'll pull the whole bally thing out," and in a moment he had wrenched the sash out of the window.

"Well," remarked Binks, as the Captain dropped into the room, "if there's swinging for this, we'll swing together."

"It don't seem much of a place anyhow," remarked the Captain, as he looked around. "Let me see; there's a door there, a shuttered-up window here, and a box-bed opposite the fireplace, and a cupboard—yes, a cupboard, apparently between the fireplace and the little window."

Binks watched the Captain closely, but said nothing; he was puzzled for his life to know what the man was after. The Captain stood for several minutes looking about and pulling his moustache in an uneasy way. Then he went to the cupboard. He examined it; not quite so carefully as Binks had done, but still with curious minuteness, striking one or two vestas to assist him, for Binks did not offer him the candle.

"I suppose the other place is the kitchen, let's have a look at it," said the Captain at last.

The kitchen was of course in complete darkness, but the Captain struck another light, and now Binks offered him the candle.

"Oh, you've got a candle; you might have saved my vestas," remarked the Captain, half reproachfully.

The kitchen was as desolate as the room. There was some straw on the floor, either the remnants of a packing or the contents of an emptied mattress, and gathered together in a corner were one or two broken articles of crockery, and an old floor-brush, worn to the wood. The grate had been removed, but since then there had apparently once been a fire lighted, probably on an occasion when the house was used as a committee-room at an election, for there were a number of torn-up voting-cards scattered about, and on the wall somebody had drawn, with a piece of burned wood, a head of Mr. Gladstone, and scrawled beneath,—

"That huge, great dragon, horrible in sight,
Bred in the loathsome lakes of Tartary."

"The sentiment is admirable, but the place is dawky," remarked the Captain, when he had looked around. "I think I'll be off."

The two men returned to "the room," and the Captain was just about to blow out the light, when he hesitated for a moment, and then he again went to the cupboard. He made another pretty close inspection, but apparently without any satisfaction, for he shut the door again and prepared to mount the window.

"Shall I blow out the light?" he asked of Binks; "or do you intend to remain longer?"

"You will pardon me," said Binks, without noticing the question, "but I shall be much obliged if you will kindly tell me why you look so particularly in that cupboard."

"Yes, I will pardon you," replied Captain Hunter; "but at the same time I shall take leave to observe that that is my business."

"Certainly," said Binks; "and as I see my curiosity has annoyed you, I regret my question."

"Oh, come now, I beg your pardon; I feel your curiosity is natural, and my reply was a rude one; but to tell the truth, now you have spoken, I myself have a curiosity to know what brings you here. Possibly the explanation of your somewhat mysterious visit might help to clear up my mystery. Shall we exchange confidences?"

"With all my heart; and to show that my curiosity is well under control, I shall begin."

Binks half leant back against the wall, half sat on the broken chair, the candle which he had taken from the other in his hand, and told Captain Hunter, who had lighted a cigarette, and standing with his hands in his pockets in front of Binks, listened with close attention to the sad story of John Cooper.

"Well, your story's gruesome enough, but it don't throw much light upon mine," remarked the Captain, when Binks had concluded his narrative.

"Which is?"

VI.

"Well, do you know," began the Captain, "this cottage is

connected with one of the most curious experiences in my life. It was in the year 1875; I had been ordered to join our second battalion, then stationed in India, and I had come to St. Andrews to bid adieu to an old aunt, and put in a day or two's work on the Links. It was the night of a ball in the town hall. I left the place about half-past one, and walked down to Playfair Terrace, smoking with my friend Ewing. He wanted me to come in, but as I had to leave next day, I was anxious to get home, so I said good-bye, and went up the narrow lane—Jacob's Ladder, you know; it was a fine clear night, after a very wet day—towards my aunt's house at Rathelpie. Ewing had given me a capital cigar when we parted, and it was not half done when I reached my aunt's door. I stood for a minute or two in the doorway to enjoy a few more whiffs, for the old lady detested smoking in the house. Whilst so engaged, I was surprised to observe a female figure pass along the road in front of me. I let her fifty yards or so ahead, and then I strolled after her, with no evil intent, I assure you, for she looked old and decrepit enough, but merely because my curiosity was excited to know what the old body could be after, prowling about at that time of the night. I followed her for about a hundred yards, and then she stopped. She was standing on the footway. There was a garden wall about seven feet high at the place. Suddenly the woman made a spring of extraordinary agility. I saw her for a moment upon the top of the wall, and then she disappeared from view. Overcome by curiosity, I ran forward, clambered up upon the wall, and looked over to see what had become of the woman. At first I saw nothing, but raising my eyes, I beheld her walking like a cat upon the top of a wall that ran straight from the road to a couple of semi-detached houses at the head of a piece of garden ground, separating apparently the respective portions of garden belonging to each house. The woman walked straight—at least, I mean, she walked on, for the wall being straight she was bound to go straight—till she came to the houses. There was a window in the second storey of the house nearest to where I was, just within reach of a person standing on the top of the wall. I saw the old woman clutch the sill with one hand, and shove up the lower sash with the other; then she drew herself up,

and disappeared from view. A moment afterwards I saw a light in the room. I need not say how completely puzzled I was by this adventure. My first idea was of course of theft; but the old woman seemed a most unlikely thief, and her movements were not those of a housebreaker—she seemed to move without hesitation or dread, as if she thoroughly knew the place. Still I felt it to be my duty to alarm the household, so I went round, meaning to ring the front door bell. I found, however, that it was a much longer detour than I had imagined to reach the front of the house, which was shut off from the back approaches by garden walls and other enclosed ground; and, when at last I got round, there were several semi-detached buildings all exactly alike, and not being familiar with the place, I was quite at a loss to know which was the one I had seen the woman enter from the back. I began to be afraid she would be out and away again, so there was nothing for it but to hurry back again to the back road where I had seen her before. When I got back, the light was still in the room, and I was just clambering over the wall to investigate matters more closely, when I saw a figure at the window. The old woman emerged, and swung herself down to the cross wall, and then I saw that she was not alone. There was another female figure at the window. The old woman stretched out her hands, and almost lifted the other from the window on to the wall beside her. Then the pair moved rapidly together along the top of the wall in my direction. I slid down from my perch, and stepped into the garden doorway. There I saw the two females descend into the road beside me, the old woman again assisting her companion, who I saw was a young girl in morning dress. The moment they were on the road, the pair moved off at a rapid rate in the direction of the country. I followed. On, on, on they went; it seemed to me an interminable journey. I thought we had walked ten miles, though we cannot have covered more than four. They passed up through this village. There was not a light or a sound in any dwelling in the place. They turned in at the garden-gate of this very cottage, and entered the house together. Presently I saw a light in this room. I tried to see in through the front window, but the blind was drawn, and I could only make out

that the pair were engaged at something about that very cupboard there. I tried the front door. It had only been drawn to, and it opened without noise. The door there, between the kitchen and the room, was open; I stole forward and peered into this room. The mysterious couple were still engaged about the cupboard, and apparently unconscious of my presence. I was dying to know what they were about, and stole round there by the bed to see past the corner of the cupboard door. But, alas, my foot trod upon a lucifer match; it went off with a loud crack. There was a movement in the press. I saw the old woman turn and look at me. She stretched out one hand, and beckoned me towards her. I hesitated; she beckoned again, I clutched the door of the bed to check my impulse to advance. Then gradually the figure of the old woman grew misty. I felt my hold on the bed relaxing. I saw nothing but two great grey eyes looking into my very soul, and the bony hand still beckoning me to come.

"There was a knocking at the door of my bedroom, and I heard my aunt's voice: 'Tom, Tom, do you know it is half-past nine o'clock?'

"I started up, and found I had been lying across the top of my bed, still in my dress clothes, though without my top-coat and overshoes, which I afterwards found in their place in the hall. My trousers were very muddy, but otherwise there was nothing wrong; and I am sorry to say it was no new experience to me to have fallen asleep after a winey night before undressing. I had no idea I had taken so much at the ball, and there was no whisky on the top of it, for I remembered quite clearly refusing Ewing's hospitality. But I must, I thought, have had far more than was good for me. My mind was a blank as to how I got home. Indeed I remembered nothing after coming up Jacob's Ladder, except that extraordinary dream about the old woman, for, of course, I thought it must have been a dream, though anything so vivid in that way I had never before experienced. Well, I left St. Andrews that afternoon. I have never been back there until yesterday, though all these years the memory of that night has haunted me. To-day I had an irresistible longing to walk out the road here. Except on that night, if I was here then, I was never near the place before. Yet, I find the village, the

cottage, the kitchen, the room, the windows, the bed, the fireplace, the cupboard, exactly as I recall that night's adventure. Upon my word, this crows all! Well, that's my story."

VII.

"It's time we were clearing out of this," said Binks; "this candle won't last many minutes longer, and it must be quite dark outside."

"With all my heart, but"—

"But we had better take one more look in that cupboard."

"Exactly."

The search was as fruitless as the former ones, and they were just turning away, when Binks raised the candle for a final look round.

"Hulloa, what's this?" exclaimed Hunter.

"Where?"

"There on the wall, just between these two pegs under the wood of the shelf."

"Only somebody been scribbling something," said Binks, with a tone of disappointment, as he looked closer to read some words faintly scratched, as if with a pin point, upon the plaster, but his heart almost stood still as he read them:

"RING UNDER STONE—V. B. B. C."

VIII.

It was quite dark when the explorers scrambled again through the window, and they had a very wintry walk to St. Andrews. Next morning they met by appointment at the Club, and proceeded up the narrow path, called Jacob's Ladder, to explore the place near Rathelpie where Hunter had such strange experiences on that March night in 1875. The Captain had no difficulty in finding the place where, as he said, the old woman mounted the wall.

"Well, she must have been an athletic old girl, if she climbed up there," observed Binks. "Now let me see which is the window?"

"That one on the left there,—just within reach of the wall."

"Let us look, now," said Binks, again; "you see that 'old wife' on the chimney? we can't mistake that. Let us go round and find who lives in the house."

Guided by the chimney-can, the two friends had no difficulty in identifying the house at the front side. There was a ticket over the door—"House to let, furnished or unfurnished. Apply to Mr. M'Gregor, House Agent." They were looking about for some one to ask as to the occupancy of the house, when the door opened, and a gentleman and lady, escorted by a man with keys in his hands, issued from the door. The man showed the couple to the gate, and he was just turning back to the door, when Hunter hailed him.

"I say, is this house to let?"

"Yes, sir. I have just been showing a lady and gentleman through it. Would you like to see the house?"

"Shall we?" asked Hunter.

"By all means," replied Binks.

As the man showed them through the public rooms, he explained that the house had been a ladies' boarding-school, kept by a Miss Oliver, who had died a couple of months before. The furniture was all in its place, and little seemed to have been touched since the good lady's death. The room with the window to the back near the wall, turned out to be a small bedroom, which the man understood had generally been occupied by one of the senior pupils. In a room near it, which had been Miss Oliver's own bedroom, there were a number of framed photograph groups hung round the wall.

"The pupils of each year, I see," observed Hunter.

"Where's '75?"

"Here it is," replied Hunter, pointing to a group under which were the words, "Sea View House, 1875."

"Now," said Binks, spotting a clue; "look carefully at this one, and see if you can recognise the girl you saw come out through the window."

"My dear fellow," replied Hunter, glancing at the photo, "it is utterly impossible. I can't say I saw the girl's face, and I would not recognise her if she stood before me this moment. The old woman! I should know *her* if I met her in Hades."

(To be concluded.)

Correspondence.

NOTARIAL EXECUTION.

(To the Editors of the *Journal of Jurisprudence*.)

SIRS,—I have been somewhat remiss in reading up the *Journal* lately, and it is only now that I notice your remarks in the April number regarding "Notarial Execution," and the relative letters from your two correspondents.

Might I ask—for I do not gather a clear view on the point, and others to whom I have spoken are interested in the query: Is it competent, in your opinion, for a notary who expedes and signs a notarial instrument relating to subjects in which he has no personal interest, also to sign the warrant of registration thereon? I infer the negative from your statement that a notary "cannot take infestment on a notarial instrument *prepared* by himself." If this is so, would the disqualification apply to a procurator or notary signing the warrant of registration of an instrument which is signed by another with whom he is in partnership.—I am, etc., "JUS."

[We are of opinion that it is competent for the notary to sign the warrant of registration in the case figured. As "Jus" is the second correspondent who has misunderstood us, we fear that our language must be ambiguous, but we cannot see where the ambiguity consists. It is true that we affirm that "a notary cannot *take infestment* on a notarial instrument prepared by himself." But the person who signs the warrant of registration does not "take infestment," it is the person whose title is made up by the deed who does so.—EDS. *J. of J.*]

Appointments.

The New Judge. — MR. WILLIAM ELLIS GLOAG, advocate (1853), it is generally understood as we go to press, will be appointed a judge of the Court of Session, in succession to Lord Mure resigned. Mr. Gloag, who is a native of Perth, and proprietor of the estate of Kincairney

in that county, has had a long and distinguished career at the Bar, and he has held in succession the offices of Advocate-Depute, Sheriff of Stirlingshire, and Sheriff of Perthshire. His duties as Sheriff have been discharged in a manner which has given unqualified satisfaction in the counties which have had the benefit of his services; and when he quitted Stirlingshire in 1885, the agents who had practised in his Court gave public expression to their profound regret at his removal from the county. At the Bar, Mr. Gloag had always a fair share of work, and within the last five years his practice has largely increased. The only exception that can be taken to his appointment is, that the new judge is rather beyond the age at which, in accordance with present practice, men are generally promoted to the Bench. He came to the Bar with two men, one of whom has been seventeen and another nine years upon the Bench, and he is senior at the Bar to six other judges, who are his seniors on the Bench. There can be no doubt, however, that the appointment is entirely in accordance with the sentiments of the Bar, by whom the new judge is held in universal regard, alike as an eminent lawyer and a kind and genial friend. Mr. Gloag is a Conservative, but not much of a politician; a Churchman, and brother of the Moderator of the General Assembly, but by no means an ecclesiastic.

MR. CHRISTOPHER N. JOHNSTON, advocate (1880), has been appointed one of the Extra Advocate-Deputes for Glasgow Circuit, in succession to Mr. David Dundas, resigned.

MR. R. FITZROY BELL, advocate (1883), has been appointed Secretary to the Universities' Commission. The Secretary to the Boundaries' Commission has not yet been appointed.

MR. WILLIAM CÆSAR, solicitor, Dundee, has been appointed Town-Clerk of the Burgh of Carnoustie.

County Council Auditorships. — There is a great run of local practitioners for these appointments, which are in the hands of the Secretary for Scotland. There seems something, however, to be said for the appointment in each case of a complete outsider to the county concerned.

Obituary.

THE LATE LORD FITZGERALD.—Lord Fitzgerald, Lord of Appeal in Ordinary, died somewhat suddenly at Dublin on 16th October. The deceased peer was born in Dublin in 1816, and, though a Roman Catholic, he was educated at Trinity College, Dublin. Called to the Irish Bar in 1838, he became a Q.C. in 1847, and rapidly obtained a large practice. M.P. for Ennis in the Liberal interest in 1852; Solicitor-General for Ireland, 1855-56; Attorney-General, 1856-58 and 1859-60; Judge of the Queen's Bench (Ireland), 1860; Lord of Appeal, 1882,—these are the leading landmarks in the professional and judicial career of John David Fitzgerald. During the twenty-two years during which he sat on the Irish Bench at Dublin, Mr. Justice Fitzgerald acquired the reputation of being one of the strongest, most fair-minded, and dignified of the Irish judges. He presided at several important trials, notably the Fenian trials in 1865, '66, and '67. But the trial which brought the name of Fitzgerald most prominently before the public of the three kingdoms was the prosecution in 1881 of Messrs. Parnell, Biggar, Dillon, Sexton, Egan, and Sheridan, by the Government of Mr. Gladstone, for seditious conspiracy. Mr. Justice Fitzgerald presided at this trial, and his charge contained a severe condemnation of the conduct of the League. In the following year Mr. Justice Fitzgerald accepted the offer made to him by Mr. Gladstone of a life peerage and Lordship of Appeal in Ordinary. From that date he has been assiduous in his attendance in the Upper Chamber during the transaction both of its judicial and legislative business. It cannot be said that Lord Fitzgerald made a great mark as an Appellate Judge. Perhaps he came to the House of Lords too late in life. His method, when an argument was opened, was to hunt up the Irish decision that came nearest to the case on hand; and to the end of the debate he hung on to that Irish decision for dear life. But though not a judge of the first weight in the House, Lord Fitzgerald never became what others who have migrated to the House of Peers late

in life have sometimes proved — a mere fossil. To the last he commanded the ear of his colleagues as a patient and intelligent coadjutor. It is, perhaps, remarkable that Lord Fitzgerald, after sitting for twenty-two years on the Irish Bench, should have been more remarkable in the House of Lords as a politician than as a judge. In the discussion of all matters of Irish politics he was, for the last year or two, one of the most powerful advocates of the policy of the present Government. His peculiar position as at once an Irishman, a Roman Catholic, and a Unionist, and his intimate knowledge of Ireland, gave a peculiar value to his political support. It is to be regretted that on the occasion of his last appearance in the arena of political discussion, he found himself in sharp disagreement with some of his judicial coadjutors. During the excitement of the Maybrick agitation, he brought forward a motion in regard to the appointment of a Court of Criminal Appeal, protesting at the same time that the motion had no reference to the current agitation. But of course it was impossible to dissociate the motion from the outside movement, and the Lord Chancellor sharply rebuked Lord Fitzgerald. The latter protested somewhat warmly against the censure, and at the same time—with what now has a ring of pathos in it—assured the House that whether or not he himself were spared for another session, the matter would then command the attention of Parliament and the country, and be pushed to the issue which he had at heart. Lord Fitzgerald's peerage of course expires with him. His judicial appointment falls to be filled up from amongst those who have held high judicial office or a law-officership in any of the three kingdoms.

THE LATE REGNOLD FITZHERBERT BERESFORD ALLEYNE, Esq., Judge of the Assistant Court of Appeals in Barbados, whose death occurred at Kensington, his residence in that island, on the 24th September, was the second son of the late Sir Regnold Abel Alleyne, Bart., of Barbados. He was born in the year 1825, and at the usual age joined the West Indian Bar. He was for many years employed as a police magistrate in Barbados, and since 1871 had held the office of Judge of the Assistant Court of that island.

THE LATE WILKIE COLLINS.—It is unnecessary to record here that Wilkie Collins is dead, but it may not be irrelevant to observe that the deceased novelist, like so many of the salt of the earth, was a lawyer. He was called to the Bar at Lincoln's Inn in 1851.

MR. H. T. BOWEN, barrister (1834), died on 30th September. He long practised in Trinidad, where he rose to be Solicitor-General, and eventually a Puisne Judge. He retired in 1870.

MR. WILLIAM SUTHERLAND FRASER, solicitor, Procurator-Fiscal for the county of Sutherland, died at Dornoch upon 18th October, in the eighty-ninth year of his age. Mr. Fraser was one of the oldest, and not the least valued, of the servants of the Crown in Scotland.

The Month.

Kent's Commentaries.—The copyright in Kent's Commentaries has expired. The *Law Librarian*, an American quarterly journal, observes that the work is now legitimate plunder for the pirates. A new edition is announced by Little, Brown, & Co., at a reduction of eight dollars in price. In the last edition reference is made to 5000 additional cases.

* * *

Accident to Mr. Montagu Williams.—At Ramsgate the other day a rather serious accident happened to Mr. Montagu Williams, who has been staying there for the benefit of his health. He was driving in a pony carriage when the ponies bolted, and ran the carriage into a fence, where it was overturned and completely smashed. Mr. Williams was thrown into the road, and a part of the carriage fell on his chest. It is feared that this unfortunate occurrence may have a serious effect on his health. A similar accident to a distinguished member of our own Bar has, we are glad to learn, led to no more serious result than to spoil the autumn holiday of the clerk who keeps the bad language day-book in the Recording Angel's Department.

Tit-Bits' Insurance and the Revenue Laws.—A practice has recently arisen of inserting in newspapers and other publications, notices or advertisements which purport to insure the payment of money upon the death of the holder or bearer of the newspaper or publication containing the advertisement, only from accident or violence, or otherwise than from a natural cause. And we can testify to the doubts which there have been as to the liability of such notices or advertisements to the stamp duty of one penny imposed by the Stamp Duty Act, 1870 (33 and 34 Vict. c. 9), upon a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause. These doubts are now laid to rest by sect. 20 of the new Customs and Inland Revenue Act (52 and 53 Vict. c. 42). The term policy in sect. 117 of the Stamp Act, 1870, is now to be construed, in relation to a policy of insurance against accident, as indicating any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence, or otherwise than from a natural cause. When the business of insurance is carried on in such a way as to make it impracticable to charge the penny duty, an account is to be delivered of all sums received in respect of premiums on policies of insurance against accident. On the amount so shown a 5 per cent. duty is to be charged. The quarterly account is to be a full and true statement of all unstamped policies of insurance which are issued, and no stamp duty is to be charged on such policies. This will surely cover the disputed cases of well-known papers which insure against railway accidents.—*Law Times*.

* * *

An Unexpected Answer.—As funny a thing as ever occurred in a Court happened in Napoleon, Ohio, in 1839, before Judge Potter and a jury. A case was on trial, and an outsider seated himself on one of the puncheons at the far end of the panel of jurors, there being no other available seat. When the defendant's counsel arose to address the jury, he scanned the face of each very closely, and naturally his gaze was

directed to the farthest man from him, who didn't happen to be a juror at all. Glaring at him, he began: "Gentlemen of the jury; I want to know what this man (referring to the plaintiff in the case) has come into Court for? What is his business? What right has he here? What is he seeking for? Again, I repeat, gentlemen of the jury, why is he here?" The countryman imagined the question had direct reference to himself, and when the lawyer paused to give due weight and emphasis to the question, he jumped to his feet and howled: "What am I here for, you cross-eyed cock of the walk? What am I seeking for in this here Court? I'll tell you in short order, you weazen-faced old son-of-a-gun. I've been here three days a-waitin' for my fees, and nary a red kin I git. Pay me my witness fees, sir, and I'll get out of here immediately." This unexpected oration brought down the house, and the lawyer never finished his able argument.—*Cincinnati Inquirer*.

* *

Judicial Dicta on Drink.—"Almost every crime has its origin more or less in drinking."—Judge Gurney. "Ninety-nine cases out of every hundred are caused by drink."—Judge Erskine. "If it were not for drink, you (jury) and I would have nothing to do."—Judge Pattison. "If all men could be persuaded from the use of intoxicating drinks, the office of judge would be a sinecure."—Judge Alderson. "Three-fourths of the cases of crime have their origin in public-houses and beer-shops."—Judge Wightman. "Intemperance has destroyed large numbers of people, and will at its present rate of increase in time destroy the country itself."—Justice Grove. "I can keep no terms with a vice that fills our gaols and destroys the comfort of homes and the peace of families, and debases and brutalizes the people of these islands."—Chief-Justice Coleridge.

* *

Counsel for the Commonwealth.—A certain coloured attorney, who was engaged to prosecute a party charged with assault and battery before a Court in Virginia, made the following speech, taken down at the time:—

"The Commonwealth have proved sault. You gentlemens

have sot thar and heard the evedence. Out of the mouf of two witnesses it shall be stablished. We have four. It has been shown in the Court before you gentlemens, that he took his lef han. Dey ain't one cintility of de evedence here to show that he was not mad. He was mad. That's malice. Playing wid him! He would have murdered him. I believe gentlemens of de jury setten on de case that this man cartain is guilty. De evedence shows it. He cut at him wid the cotton hook, and when his back was turned he drive the cotton hook in his head. Reasonable doubt! 'Spose he goes round and cracks every man on de head, he'll soon kill de dock up, and thar'll be nobody to work. He struck him first wid de box. He was mad, and then when he want looking he struck him in de head wid the cotton hook. I shall not entertain you gentlemens much longer. Henry Walker! What does he know? He never saw nothing in de commencement and never saw nothing in de end, but he heard something. He winds up uncompromised ignorant and deluded; man don't want him, and God won't have him."

The attorney who made the above speech has his licence, signed by two judges of this State, who certified that he was, upon examination, found "duly qualified" to practise law. The gentleman who furnished the above speech informs us that the attorney is equally as good a lawyer as he is a grammarian. This speaks well for his legal acquirements, as well as for those of the learned judges who granted him licence. It is a pleasant thing to know that some members, at least, of our judiciary have a due regard for the dignity and learning of the profession.—*Virginia Law Journal*.

Reviews.

A Handbook of Conveyancing for the Use of Students. By JOHN BURNS, B.L. Edinburgh: Messrs. William Green & Sons. 1889.

THE first thought of every law student is of passing his examinations. Of his ability to do so many a student enter-

tains serious doubts—of his qualification to pursue the practice of his profession, if only he were through his examinations, no student has any doubt whatever. The object of the work before us is to help students to pass their examinations in law, not to equip them for its practice in after-life. As the primary object of the student is, as we have said, to pass his examination, the book will no doubt be of assistance to many. It contains concise statements, with appropriate divisions and sub-divisions, of the rules of law upon the subject dealt with. It might serve as an outline or syllabus of a course of lectures upon conveyancing. No authorities are quoted; the work being for young learners, they must take their law from their teacher without cavil or question. We heartily commend the work to all those who wish to get up enough conveyancing to carry them through an examination, with the least possible trouble in the shortest possible time.

Papers read before the Medico-Legal Society of New York from its Organization. First Series. Third Illustrated Edition. New York: The Medico-Legal Journal Association Publishers, 57 Broadway.

THE Medico-Legal Society of New York was founded in 1867, and throughout its career has been an energetic and enterprising body. That a third edition of its Transactions should have been called for, shows that many of the papers read before it are of permanent value. The present volume is a portly print of 600 pages, with a number of portrait illustrations. The articles are, many of them, of much interest; but the value of the work might have been greatly enhanced by a little work of hardly more than a clerical character. The portraits and biographical notices are scattered through the volume without pagination or any preliminary list; there is no Table of Contents, and the Index is exceedingly meagre. The frontispiece is appropriately an excellent portrait of Clark Bell, the distinguished President of the Society.

Sheriff Court Reports.

SHERIFF-COURT OF CLACKMANNAN AND KINROSS.

Sheriffs MUIRHEAD and JOHNSTONE.

LYNN v. LYNN.

Succession—Heritable and moveable—Goodwill—Public-house.—In a question between the heir-in-heritage and the next of kin of a publican who carried on business in a public-house belonging to himself, held, that the goodwill of the business did not form an asset of the moveable estate, and was not detachable from the premises in which the business was carried on.

This was an action of count and reckoning at the instance of the younger children of the deceased Robert Lynn, spirit-dealer, Alloa, against David Bowman Lynn, the eldest son and heir-at-law of the deceased, in which an important legal point was involved. The pursuers contended that the defender was bound to account for the goodwill of the business to the next of kin; the defence being that the goodwill, if any, was an adjunct and inseparable from the premises, and thus fell to the heir-at-law.

The Sheriff-Substitute pronounced the following interlocutor:—

“The Sheriff-Substitute having heard parties’ procurators and considered the proof, productions, and whole process: Finds in fact (1) That the pursuers are the younger children of the late Robert Lynn, publican in Alloa, who died there intestate in October 1887, and they sue the defender, their elder brother, who is the heir-at-law and also the executor of the deceased, to account to them for their share of legitim out of the moveable estate of which the deceased died possessed. In particular they claim that the defender is bound to account to them (a) for the value of the goodwill of the business carried on by their late father, and (b) for the sum of £100, being the admitted amount of the drawings from the licensed premises during the time the business was conducted by the widow of the deceased, viz. from the date of the deceased’s death till the entry of the new tenant at Martinmas 1887. (2) That at the date of his death, which occurred in October 1887, the late Robert Lynn carried on the business of a publican in premises belonging to him in Alloa known as the Bridge Inn. (3) That after his death the business was carried on by his widow for the benefit of her family, but after a short time this arrangement was departed from and the premises were advertised by the defender to let. (4) That a number of offers for the premises were received by the defender (see offers produced Nos. 127 to 168 of process), and that of Mr. Joseph Sangster was ultimately selected. (5) That the said Joseph Sangster entered into possession at November 1887, and by the contract between him and the

defender he was to pay the sum of £85 per annum as the yearly rent stipulated in the lease, and the further sum of £495, which was to be paid over a period of five years and a half in eleven half-yearly instalments, and for which a bond was to be granted by Sangster. (6) That the said lease and bond, drafts of which are in process, were not signed by the said Joseph Sangster up to August 1888, and about that time he was allowed by the defender to resile from his bargain, and the defender himself then entered into possession of the premises, and has since carried on the business: Finds that at the death of the late Robert Lynn, the goodwill of the business carried on by him did not form an asset of his moveable estate, and was not detachable from the premises in which said business was carried on: Finds in law that the defender is not bound to account to the pursuers for the value of said goodwill: Finds further that the sum of £100, being the drawings above referred to, have been sufficiently vouched for by the defender: Finds that the joint minute, No. 195 of process, disposes of the only other questions raised in the case, and after giving effect to the term of said minute there remains a balance due to the executor of £69, 14s. 5d., for which sum decerns against the defender: *Quoad ultra*, assoilzies the defender from the conclusions of the action: Finds him entitled to modified expenses: Fixes the same at one half of the taxed amount: Allows an account thereof to be given in, and when lodged remits the same to the auditor of Court to tax and report, and decerns.

(Signed.) "TYNDALL B. JOHNSTONE.

"*Note.*—The parties here renounced probation except as regards the question of goodwill, which is the most important question raised in the case. The defender states no plea separately applicable to goodwill, but denies generally that there is any free residue to account for. At the hearing, however, it was argued for him, that even if there was such a thing as goodwill, it was not in the present case detachable from the premises. After some hesitation, the Sheriff-Substitute has come to the conclusion that this contention is a sound one. If the goodwill of the business carried on by the deceased formed an asset of his moveable estate, and was *in bonis* of him at the time of his death, the defender is clearly bound to account for it, but the Sheriff-Substitute is unable to hold that it was; and an examination of the position and rights of the defender as heir-at-law is important in this connection. On the death of his father, the defender was entitled to deal with the premises as he liked. He might—as was suggested by his agent at the hearing—have decided to divert the premises from the purposes of a public-house to those of a temperance mission-hall; or he might have chosen to use them solely as a private residence for himself. In either of these cases what becomes of the goodwill? Even had he decided to sell the premises, how could the value of the goodwill—as distinct from the value of the licensed premises—have been ascertained? or could it, apart from the premises, have

had any appreciable value whatever? The pursuers, however, argued, that in point of fact the defender had not followed any of those courses, and that the case must be dealt with on the circumstances as they exist, which they maintained showed that a substantial sum was obtainable for goodwill. The Sheriff-Substitute cannot agree with this contention. The defender was either liable to account for goodwill or he was not, and such liability it is thought could not be contingent upon the manner in which he chose to deal with his own property as heir. If, therefore, he would not have been liable to account in the events above referred to, he cannot be held to be so now. The Sheriff-Substitute, therefore, has come to the conclusion, that goodwill did not form a separate moveable asset which was *in bonis* of the deceased at the date of his death, and that if such an asset existed at all, it was so connected with the heritable subjects as to be undetachable and heritable in its character.

"But, further, the Sheriff-Substitute does not think that the pursuers have proved the value of goodwill even in the present circumstances. The offers produced undoubtedly indicate that under the name of goodwill or bonus, a considerable sum could have been obtained by the defender; but it appears that a practice extensively prevails of letting public-houses at small rentals with a large sum paid in name of "goodwill," the object apparently being to keep down rates. The Valuation Appeal Courts, however, have held that in such cases the Assessor is not bound to take as the basis of assessment only the rent stipulated in the lease, but may deal also with the sum which is paid for goodwill. Payments, therefore, which are made under name of goodwill may in many cases be properly regarded merely as anticipated rent; and in the present case part of it, at all events of the sum in the bond, must be so regarded. But it is unnecessary to criticise the pursuers' claim further in this direction, as according to the view taken by the Sheriff-Substitute, there was no asset of a moveable character which could be described as goodwill belonging to the estate of the deceased at the time of his death; and it is only the course followed by the defender, in dealing with the heritable property, which gives colour to its existence now.

"In the general question of accounting, the parties have lodged the joint minute No. 195 of process, which settles most of the questions raised; but the pursuers still insist that the defender shall account to them for the drawings from the licensed premises between the date of the deceased's death in October 1887 and Martinmas 1887. The amount of these drawings has been fixed by consent at the sum of £100. During the period in question, the widow of the deceased, by arrangement of the family, carried on the public-house; and after leaving it at Martinmas, she and three or four of the family resided together in Alloa until May 1888. The defender alleges that this sum of £100 was all expended by her during the interval in maintaining herself and family, and he has produced vouchers for accounts incurred by her and paid to the amount of over £70 (see Nos. 178 to 194 of

process). In the Sheriff-Substitute's opinion the defender has sufficiently discharged himself by so doing.

"As the pursuers have been successful to a certain extent, the Sheriff-Substitute thinks the defender is not entitled to more than the modified expenses allowed. (*Moore v. Bell*, 8th November 1884; *Bain*, 10th January 1878; *Llewellen*, 5th May 1875; Law Rep. 10 Commom Pleas 456.)"

The pursuers appealed to the Sheriff, who adhered by the following finding:—

"*Edinburgh*, 27th May 1889.—The Sheriff having resumed consideration of the cause, repels the additional plea-in-law stated for the pursuers: adheres to the interlocutor complained of: finds the defender entitled to the expenses of the appeal, and decerns.

(Signed) "JAS. MUIRHEAD.

"*Note*.—An able argument was submitted on behalf of the pursuers. I adhere nevertheless to the judgment of the Sheriff-Substitute, and to the reasons for it very clearly expressed in his note. As between the tenant of a public-house and a party buying him out in expectation of succeeding him in his lease, goodwill may have a very intelligible meaning and a very substantial independent value. But as between landlord and tenant, a payment in name of goodwill is just rent under another name. There is reported a judgment of Vice-Chancellor Stuart in a case (*Booth v. Purvis*, 1860, 17 W. R. 393) which is nearly on all fours with the present. On the death of an intestate a public-house belonging to him, and in which he carried on business, was disposed of on a twenty-one years' lease at a rent of £100 per annum with a cash payment of £1580 for the goodwill. In an administration suit it was held that as between the heir-at-law and the next of kin the so-called goodwill was an adjunct of and inseparable from the house, and that the price obtained for it went to the heir-at-law. The cases of *Chisum v. Dewar* (5 Russ. 29) and *Ex parte Punnett* (16 Ch. Div. 233) were decided upon the same general principle. (Intd.) J. M."

Act. Thomson—Alt. Laing.

RICHARDSON v. THE NORTH BRITISH RAILWAY COMPANY.

Highway—Road Board power to close temporarily—Railway Clauses Act, 1845, sec. 46.—A County Road Board have no power to close a road, without providing a substitute road, to accommodate a railway company, who desire, for their own convenience, to alter or enlarge a bridge upon the road crossing their line.

This was an action raised by Mr. David Richardson, farmer Kinross, against the North British Railway Company, for damages for loss of use of a road connecting one part of his farm with another. The Sheriff pronounced the following interlocutor and opinion, which sufficiently explain the particulars of the case:—

“Alloa, 8th July 1889.—The Sheriff-Substitute having considered the closed record and whole process: Finds that the pursuer, who is a farmer at Gallowhill, near Kinross, occupies lands lying on both sides of the defenders' line of railway between Kinross Junction and Milnathort, and previous to the act of the defenders complained of he had access to the fields occupied by him on the south side of the bridge near Gallowhill, which carried the public road leading from the Great North Road to the Stirling Road leading to Milnathort over the defenders' line of railway: Finds that the defenders, the North British Railway Company, are at present engaged in adding a second line of rails to their permanent way between Kinross Junction and Milnathort, and the existing bridges not having been constructed to carry roads over a double line, it was found necessary to add to the length of span of the bridge at Gallowhill, and about the end of February last the defenders proceeded to take down said bridge with this object: Finds that before doing so the defenders or their contractor entered into an arrangement with the Road Board of the county of Kinross, under which the said Board authorized them to take down the bridge and re-erect it without providing a substitute bridge or road, and the said Board, with a view to enable this operation to be carried out, declared the road closed for repairs, and duly advertised the fact in the local newspapers: Finds that under the arrangement with the Board the defenders did not provide any substitute bridge or road, but that they made certain improvements on the new bridge and its accesses: Finds that the pursuer was deprived of the use of the bridge as an access to part of his farm for about three weeks or a month: Finds that the bridge was re-opened for traffic on the 2nd April last, and that the pursuer has since by minute No. 9 of process restricted his claim to the expenses of process: Finds in law that in terms of the 46th section of the Railway Clauses Act, 1845, the defenders were bound to provide a suitable bridge or road for the convenience of the public during the necessary alterations on their bridge at Gallowhill, and that this statutory duty rested on them personally, and could not be delegated to their contractors: Finds that the defenders have not alleged on record facts or circumstances which justify their failure to comply with said statutory duty: Repels the defences accordingly: Finds that the pursuer was warranted in raising the present action, and is entitled to the expenses of process: Appoints an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report and decerns.

“Note.—The defence to this petition is twofold:—First, that the road in question having been declared closed by the authority of the Road Board, the defenders were not in the circumstances obliged to provide a substitute bridge or road. This raises a question of some difficulty, the Road Board not being called as defenders. It was not disputed, however, at the hearing that the Board, under their arrangement with the contractor—who must be

regarded in this inquiry as the same person as the railway company—agreed to declare the road closed, solely with the view of getting certain improvements made upon the bridge and its accesses, and not for the purpose of repairing any part of the road itself as distinct from the bridge. In effect, the Board said: ‘If, on constructing your bridge, you will agree to carry out our suggestions, we, as the Road Board of the county, will declare the road closed for repairs, and you will then be saved the expense of providing a substitute road or bridge while repairing it.’ In the Sheriff-Substitute’s opinion, the Road Board acted *ultra vires* in closing the road for such a purpose. By the Roads and Bridges Act of 1878, highways and bridges are vested in the road authorities, but the 3rd section of the Act declares that the word ‘highways shall not include any bridge which any person is at the commencement of this Act bound to maintain at his own expense.’ Under the 60th section of the Railway Clauses Act, 1845, the defenders are bound to make and maintain all necessary bridges, etc. This particular bridge, therefore, and its accesses was not, in the Sheriff-Substitute’s opinion, vested in the Road Board. Apart altogether from their arrangement with the Road Board, the defenders were bound to reconstruct the bridge in accordance with the standard required by the Railway Clauses Act, and the Road Board could not in the circumstances relieve them of their statutory duty to provide a substitute road. A Road Board has power to declare a road closed as dangerous, but that was not the ground of the resolution come to by the Board in the present case; it has also power to declare a road closed for repairs, but in the Sheriff-Substitute’s opinion the statutes giving this power do not contemplate its exercise in such a case as the present. There was no duty on the Road Board here to repair or alter the bridge, the operations were required solely in consequence of the policy of the defenders in doubling their line, and in carrying them out they were bound by the conditions laid down in the Railway Clauses Acts. Article 5 of the defenders’ revised Statement of Facts explains the arrangement come to between the defenders’ contractor and the Board. That article points to the resolution of the Board closing the road as antecedent in time to the arrangement itself, and begins with the words ‘but in consequence of the road being so shut up,’ etc. From the admission made at the debate, however, it was evident that the arrangement was come to, not because that road was closed, but that the road was closed because of the arrangement previously come to. On this part of the defence, the Sheriff-Substitute has come to the conclusion—although not without difficulty—that in resolving to close the road under the circumstances, the Board acted *ultra vires*, and that no effect should be given to their resolution. To take a different view would be to hold that a railway company, acting in conjunction with a Road Board, could evade the provisions of the Railway Clauses Act. The second ground of defence put forward is more easily disposed of, viz.:—That the defenders are not responsible

for the acts of their contractor. They plead that the arrangement between their contractor and the Board was entered into without their consent, and was contrary to their contract with the former. The Sheriff-Substitute has no hesitation in repelling this defence. The defenders are acting under a statute where large powers are conferred upon them, and it is proper that the conditions which are laid down in the interests of the public should be strictly guarded. The particular duty of providing a substitute bridge or road is imposed upon the defenders, and they are bound to see that it is carried out. It is trite law that a person legally bound to do a thing cannot delegate his responsibility. Since *avizandum* was made with this process, the Sheriff-Substitute has felt the case might have been more satisfactorily disposed of in some respects after proof. A proof, however, was refused by him with the view of saving expense, the main question at issue being already settled."

SHERIFF SMALL DEBT COURT OF MIDLOTHIAN.

Sheriff-Substitute HAMILTON.

THE SCOTTISH HERITABLE SECURITY COMPANY LIMITED v. WHITE.

Landlord and tenant—Obligation to remove—Breach of contract—Act of God.—A tenant was under an obligation to remove at Whitsunday, but at that date his children were ill with measles, and he was unable to remove. *Held*, that he was liable to the landlord for the loss sustained through his failure to remove.

In giving judgment the Sheriff said that he had thought it right to consult Sheriff-Substitute Rutherford, and the conclusion he had come to, aided with Sheriff Rutherford's opinion, was that there was breach of contract, and that defender was liable for the loss sustained by pursuer in consequence of his failure to vacate the house on the 28th May. Such failure was due to certain circumstances over which he had no control, but it seemed to him not to make any difference because the circumstance was not connected with him personally. The landlord, at all events, had nothing to do with it. It was a hard case, of course, and a misfortune to the defender, but he had to give decree with expenses.

All communications for the Editors to be addressed to the care of the Publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

THE JOURNAL OF JURISPRUDENCE

AND

SCOTTISH LAW MAGAZINE.

Editorial.

The Civil Law Chair.—Every one knows that the law of Scotland is based upon the law of Rome, and that a knowledge of Roman law has always been regarded as part of the equipment of the Scottish lawyer. There can be no doubt, however, that the multiplication of text-books and decisions, and the enormous changes in the conditions of modern life, within the last two centuries, have greatly diminished the practical importance, to the working lawyer, of acquaintance with civil law. Nobody now-a-days will, for the mere sake of its utility in practice, do more than study the general outline of that system. To the scientific student of jurisprudence, however, the *jus civile* will ever be one of the great fountains of legal principle, and its close and accurate study will never fail to repay the scholarly jurist. It is gratifying, in view of this consideration, to find that so many candidates have entered the field for the Civil Law Chair. They are all gentlemen of such undoubted conscientiousness, that none of them could for one moment be suspected of being other than thoroughly acquainted with the subject he aspires to teach; indeed, the fact that they are all prepared to submit their claims to the arbitrament of their brethren of the Bar, who so well know the work and the bent of studies of each of them, is a sufficient guarantee of the attention they have devoted to this branch of research. These studies have certainly not been pursued with a view to professional advancement, or even of academic appointment, for the openings to

such are rare, and there was no prospect a year ago of one occurring within half a generation. So much scholarly application, prompted by a purely scientific spirit, entirely disposes of the complaint which we sometimes hear of the decadence of scientific jurisprudence in Scotland.



The Ballot in the Jury Box.—When the Ballot Bill was before Parliament, Mr. Disraeli and others opposed it, on the ground that it would lead to a decay of that manliness and courageousness of conviction which have been supposed to be characteristic of our countrymen. The objection was pooh-poohed, and the Bill was passed. As a piece of electoral machinery it has undoubtedly worked well, has repressed many evils, and almost entirely eliminated rowdiness even from a keenly-contested election. It may be questioned, however, whether it has improved the tone of public morality. Those who are most familiar with elections, know that even in contests where there can be no suggestion of undue pressure, large numbers of the electors lie most shamelessly as to their action. Indirectly, too, the change in the practice of elections has had unsatisfactory results. The theory seems gradually to be disseminating itself throughout the community, that, so far from its being the duty of a man who has a voice in the decision of any question of importance, openly to state, and if necessary to support, his opinions, it is a positive infringement upon his "rights" to call upon him to do so, and that under all circumstances he is entitled to claim to give a secret vote. It has been publicly stated, for example, and without contradiction, that in the recent Laurie trial, the jury, instead of deliberating upon the case, and each one stating his opinion and his reasons for it, took a silent and secret ballot. So complete was the secrecy, that even after the trial was over, jurymen seem to have been ignorant who were in the majority and who in the minority. The validity of the verdict is of course not thereby affected; indeed, few who have studied the evidence can doubt that, had the jury proceeded in the ordinary and proper way to discuss the case, the majority for a conviction would have been much more decisive. A man who is opposed to capital punishment, as it has been stated was the

case with some of the jurors, can much more readily either break his oath, or reconcile it with his conscience to give effect to some fanciful theory or theoretical doubt, when he is allowed to give a sneaking vote by ballot, than when he is called upon openly to state his opinion.

* * *

Shuffling the Sheriffs.—Two vacancies—one arising from a well-earned promotion, the other from an untimely and regretted death—have caused a complete change of cast in the Sheriffs of Scotland. Regardless of the feelings and vested interests of Almanacs, Year-books, and Directories, the authorities have completely shuffled the pack. To the vacancies occurring through the removal of A. and B., X. and Y. have not been respectively appointed. That would have been too simple. It would not have caused commotion enough. So C. has succeeded A., and D. has succeeded B.; E. has then moved up to fill the gap caused by C.'s elevation, and F. similarly steps into D.'s shoes; and so on—until X. succeeds V., and Y. comes in place of W. We are far from finding fault. The appointments are excellent; the principle is sound. But it is hard on Almanackers, and it is fortunate that the year is so nearly run out, and that its successor is already so close to the gate.

* * *

The Whitechapel Tragedies.—Dr. Forbes Winslow is silent. That makes us uneasy. By this time he must have caught the fiendish perpetrator of the notorious Whitechapel murders. Two months ago he told us he was about to do so; and his time is up, has been up six weeks; so that the doctor must have the murderer safe—either in his laboratory or in spirits of wine. Now, is it right and proper that Dr. Winslow should keep this fiend to himself? Ought he not to deliver him up to justice first—to be tried? Let him, of course, make his own conditions. Let him stipulate that after the criminal has been tried and condemned, he shall be handed over to him (Dr. F. W.) to dissect or otherwise use in the interests of science and newspaperiety. But that preliminary formality ought really to be gone through. As a juristic

journal we assert it. A writ of *habeas corpus* ought to be issued against Dr. Winslow to produce the body of the murderer, whom he so confidently announced his intention of catching. Besides, it is not becoming to the great and hysterical world of Cockneydom that its Pied Piper should go unrewarded.

Special Articles.

THE VERDICT OF "NOT PROVEN."

IN a recent famous trial for murder by poisoning in England, where the prisoner was convicted, it was said by many critics in the daily press, that if the prisoner had been tried in Scotland, a verdict of "not proven" would, on account of the conflicting nature of the medical evidence, have been returned. We have no intention of discussing the verdict in the case referred to, but the criticism is worth a moment's attention. It implies that in Scotland a prisoner has either one chance more than in England of being acquitted, or that a criminal trial here is not directed solely to affirm or negative the fact of an accused person's guilt, but is also intended to be a public investigation which may or may not end in convicting or properly acquitting any one. With regard to the latter of these two alternatives, we may say at once that the criminal law gives no countenance to it whatever. Each prisoner is asked—formerly immediately preceding the trial, and now, since the recent Criminal Procedure Act, at a special pleading diet—"Are you guilty or not guilty?" If he plead "not guilty," a jury is empanelled exclusively for the purpose of trying the truth of that plea, and it will be shown further on how "not proven" can be an answer to the plea.

As regards the former alternative, namely, that a prisoner has one chance more than in England of escape, it, too, is altogether a mistake, though here the error is not quite so self-evident. When an English lawyer is told that a person accused of being guilty of a particular crime can, except under special circumstances that do not affect the present inquiry, be tried only once, and that a plea of having tholed an assize is a

bar to a future trial for the same offence, he at once asks :— How can that be so, if the verdict returned is "not proven" ? This verdict he considers as the Scotch equivalent to an English jury disagreeing, in which case a prisoner can be tried again ; and it seems to him most extraordinary that in similar circumstances a Scotch prisoner should get off scot-free. When it is pointed out to the English inquirer that no Scotch jury can be in the position of an English jury disagreeing, because the former acts by a majority, he can only again, without as a rule obtaining any further satisfaction, repeat his question, and be forced in the end to take the word of the Scotch lawyer, that in the eye of the law "not guilty" and "not proven" mean the same thing. Now, it cannot be denied that juries consider the verdicts different, and that even judges and institutional writers have seemingly lent countenance to the same view. Thus Baron Hume, in his Commentaries (vol. ii. p. 440), says, "Not uncommonly the phrase *not proven* has been employed to mark a deficiency only of lawful evidence to convict the panel, and that of *not guilty* to convey the jury's opinion of his innocence of the charge." And in the case of *Thomas Galloway and Peter Galloway*, 27th June 1836 (1 Swinton 232), in a trial for murder, where the charge was withdrawn after the evidence for the prosecution had been led and the jury returned a verdict of "not proven," the Lord Justice-Clerk intimated that the verdict should have been "not guilty." Again, in Bell's Law Dictionary, which is the work English lawyers first turn to when inquiring into the mysteries of Scots law, the fact is broadly stated that there are three verdicts in criminal trials. It must thus be admitted that a popular distinction, shared even by the legal profession, has been drawn between the two verdicts of acquittal. Strictly speaking, however, there is none. The old Scots Act, 1587, c. 92, which is still the only statute in force on this subject, among other matters enacts, "that they (the jury) be inclosit as said is unto the tyme they be fully agreit and return their answir be the mouth of the said chancellair to the Judge." A jury's sole duty is thus to return their answer, and this they can do in any manner they choose. As might be expected, therefore, seeing there is no statutory form given, these answers have

varied from time to time. The older forms were (Hume, ii. 440), "*fylit, culpable, or convict, and clean or free, and sometimes, but more rarely, innocent.*" Towards the end of the seventeenth century these old forms of verdict ceased to be used, and the phrases *proven* or *not proven, guilty* or *not guilty* took their place. A glance at the various answers shows that all refer to the prisoner except "*proven*" or "*not proven,*" which refer to the crime. A prisoner was "*fylit, culpable, or guilty,*" or "*clean, free, or not guilty.*" How came it that "*proven*" or "*not proven,*" words which referred not to the criminal but to the crime, were introduced at all. It would appear that they first came into use in this way. Great exception began to be taken, towards the close of the seventeenth century, to the loose way in which trials were conducted. Sir George Mackenzie especially, in his treatise on Criminal Law, strongly condemned them as leaving too little to the judge and too much to the jury, and that juries were often put to decide most difficult questions of law—such as the guilt of one accused of being art and part guilty. Mackenzie, who was Lord Advocate during this period, used his influence to alter this. His authority, therefore, and the prevailing legal opinion were the means of altering the form of the indictment, and introducing a form which contained a full detail of the whole circumstances of a case, from which every degree of guilt—from that of the actor to the most remote degree of art and part guilt—could be inferred. On this libel an interlocutor of relevancy was pronounced, remitting the detailed account of the crime and the manner of committing it, for it amounted to that, to proof. Following on this, the jury returned their verdict—either a special one, finding certain facts proved, and leaving the Court to draw the conclusion, or they found a general verdict that the libel was proved or was not proved; and, as Baron Hume says, "even when they returned a general verdict, still it was thought more suitable for them to employ the terms *proven* or *not proven*, as clearly referable to their own peculiar department, than those of *guilty* or *not guilty*, which might cover a complex and more enlarged view of the case, such as might be alleged to encroach on the functions of the Court." In course of time this style of

libel and interlocutor ceased to be used. In their place we find shorter indictments, merely describing in the minor proposition facts amounting to a crime, and a general interlocutor of relevancy, merely stating that the libel is relevant to infer the pains of law. The verdicts, however, which were in writing until the beginning of this century, continued to be couched in the forms introduced to meet the interlocutor of relevancy, which detailed every fact that could be submitted to probation. In other words, the verdicts of "proven" and "not proven" continued to be used. The jury, by their verdict, continued either to find the libel proven or not proven, or the panel guilty or not guilty, or a common form was for the jury to find the libel proven and the panel guilty, or the libel not proven and the panel not guilty. These four verdicts continued to be in common use until the beginning of the present century, when the verdict of "proven" ceased to be common. It gradually fell into disuse, and is now quite unknown in practice. Why this should have happened, it is impossible to say, but probably the reason was that it was found unnecessary. The verdict of "not proven," on the other hand, has kept its place, and is constantly used. It is perhaps the favourite verdict of acquittal. The curious fact about it, however, is, that it is not, as might have been expected, since the disuse of *proven* that it has come popularly to mean an acquittal because legal evidence is lacking; but that it had that popular meaning last century when "proven" was in common use, and must have been known to the people.

However these things may be, two facts are certain. The first is, that the verdict of *not proven* was not introduced to be a third verdict different from "guilty" or "not guilty," but was the converse of *proven* and the equivalent of "not guilty." The second fact is, that *proven* and *not proven* were introduced by the lawyers at the end of the seventeenth century as the most appropriate for returning verdicts in the form in which they were then desired. There is another argument, which, though it may be unnecessary, yet since it, in itself, conclusively proves that the supposed distinction between *not proven* and *not guilty* is a popular and not a legal one, may therefore be mentioned. It is that there are two kinds of sentences in

criminal trials, one for acquitting and one for condemning prisoners, and that the sentence of absolvitor is universally pronounced whenever a verdict of *not proven* has been returned. Such is the explanation of this verdict, and no one in Scotland has ever suggested that it has been a means of enabling guilty prisoners to escape; and the other criticism, that an innocent man may have had to put up with it, instead of being acquitted with his character cleared by a verdict of "not guilty," is not a substantial grievance, and at any rate is based on a popular misconception as to its meaning and effect.

THE ARRAN MURDER TRIAL.

WHEN one considers this case, which has been aptly described by the Lord Justice-Clerk as "one of the most remarkable cases that had ever come before a Court of Justice," and one "almost inconceivable to the ordinary mind," the familiar saying that truth is stranger than fiction seems to be amply justified. Many a novelist's plot, considered by critics as "far-fetched," is clear and probable in comparison with this case, which, to a large extent, must still remain the "Arran Mystery."

The jury, by a majority, found John Watson Laurie guilty of the murder of Edwin Robert Rose, and this verdict we are not inclined to say was wrong. The case the jury had laid before them was a most difficult one, one almost entirely of circumstantial evidence, and evidence which on many points admitted of different theories, equally surprising but equally probable.

The entire absence of any *adequate* motive, the fact that the medical evidence was about equally favourable to either theory of death (indeed, one is inclined to think, more favourable to the theory advanced by the prisoner's counsel), and the extraordinary behaviour of Laurie immediately after leaving Arran, a behaviour difficult to reconcile with either innocence or guilt, were points which required from the jury careful discussion and consideration, as also the unenviable obligation to determine. Judging, however, from the short

time the jury were away, much of which must have been taken up in "balloting,"—a practice somewhat unusual, and, we think, unsatisfactory,—these points must not have appeared so difficult to them as one might be inclined to suppose them to be.

As the facts of this extraordinary case are well known, we will only refer to them briefly. Rose, an Englishman, spending his summer holiday on the west coast of Scotland, accidentally met Laurie (who was passing then under the assumed name of Annandale), and accosted him, having mistaken him for some one else. Although the mistake was explained, Rose made it the basis of a traveller's acquaintance, which, in spite of the remonstrance of one of his friends, appeared to have developed into friendship for Laurie. Their first meeting was on the 12th of July; and on Saturday, the 13th, they went to Arran, and lodged together at a place called Invercloy, near Brodick, occupying the same room and bed. On Monday, the 15th, they set out to climb Goatfell, and they were last seen together on the top of that mountain, looking towards Glen Sannox, presumably intending to descend by that way. About ten o'clock on the Monday night Laurie was alone at the Corrie Hotel, and there expressed the intention of walking to Brodick that evening. It was proved that Laurie left Invercloy early next morning, carrying with him two bags; that he spent the next few days passing between Glasgow and Rothesay; that he had been seen wearing some of Rose's clothing; and that whenever he heard that a search was being made for his late companion, and when it was suggested to him that he ought to give any information he had about Rose, he threw up his situation in Glasgow, and began his miserable, long wanderings, which, in spite of the inefficiency of the police, ended in his capture.

Until Sunday, the 4th August, the search for Rose was unsuccessful; but on that day his body was discovered at a place called Coir-na-fourin, near the top of Glen Sannox, lying under a boulder, and concealed by a wall of stones and turf. The head was frightfully mangled and decomposed; but the two doctors who were first called to make an examination were decidedly of the opinion that Rose had met his death not through accident, but through intentional violence,

and other circumstances, such as the rifled pockets of the dead man, went far to confirm that opinion.

Naturally Laurie, who was the man last seen in company with the unfortunate Rose, was suspected, and his proceedings, both before and after leaving Arran, having been carefully investigated, a mass of evidence more or less circumstantial was at his trial preferred against him, and he was found by a majority of the jury guilty of murder, and accordingly sentenced to death.

The defence put forward by the Dean of Faculty for the unhappy man was,—that there had been no murder,—that Rose had met his death by accidentally falling over a cliff, and he contended that the weight of medical testimony favoured that view,—that Laurie had parted with Rose on the top of the hill, and that his subsequent behaviour was compatible with this theory,—that it was not unlikely that some other person found the body, robbed it, and then buried it. The learned Dean's cross-examination was a masterly performance, and his speech undoubtedly an eloquent and ingenious defence. The Crown case was well and carefully conducted by the Solicitor-General, the order in which he examined his witnesses being judicious and skilful, and his address to the jury able and marked by his characteristic fairness. The learned judge's summing up was powerful and convincing. In considering this trial, we cannot help thinking that trial by jury in criminal cases, as at present conducted, is very far from satisfactory. In a civil jury trial, where say a matter of £25 is in dispute, few counsel would think of agreeing to a majority verdict until the jury had retired the statutory three hours for consideration; but in a criminal trial, where a man's life is at stake, a jury in thirty-five minutes, by a majority of one, finds the capital charge proved. This to a layman appears an absurd state of things. However, the conclusion at which the majority of the jury in this case arrived at was the right one, for there can scarcely be any reasonable doubt that Laurie perpetrated a cruel, cold-blooded murder. How a man respectably brought up, impelled by no pressing want, apparently without any premeditation, should be guilty of brutally murdering an inoffensive stranger, and one who had treated him as a friend,

is a psychological problem which some philosophical novelist may try to work out. We do not attempt to offer any explanation.

THE WRITING ON THE WALL.

IX.

"MR. BINKS,—Mrs. Sinclair at home, Tuesday, 28th March—9.30 to 2. 25 Eglinton Crescent, 3rd March 18 . Dancing. *R.S.V.P.*"

This was very remarkable. Binks was not a dancing man, and he had never heard of Mrs. Sinclair. There must be a mistake somewhere. Undoubtedly it must be meant for his brother Peter, the civil engineer, who went constantly out. But no! the envelope was against that; for by no possibility could "Theodosius Binks, Esq., advocate," be made to read "Peter Binks, Esq., C.E." However, he would ask Peter about it. Perhaps Peter could explain,—at all events, he would tell who Mrs. Sinclair was, for Peter knew about everybody. In this latter conjecture Binks was not mistaken. Peter could tell all about the Sinclairs; in fact, though he had not Mr. Sinclair's acquaintance, he, as usual, knew a great deal more about him and his circumstances than Binks did about most of his own intimate friends. Mr. Sinclair, it appeared, was a Glasgow merchant, new to Edinburgh, but very wealthy, and "not at all a bad sort."

"But why should they invite me?" inquired Binks.

Peter did not know,—in fact, he was even more surprised than his brother that Theodosius should have been asked, and, to tell the truth, he did not much like it; for the Sinclair girls were dancing acquaintances of his own, and for the last week he had been angling, without success, for an invitation.

"Of course you wont go," remarked Peter superciliously.

Now, all Peter's persuasive powers would never have induced Binks even to consider his going to this or any other dance as within the bounds of practical possibilities. But this remark prevailed. For a younger brother Peter was becoming unbearably superior.

"Yes," replied Binks, "I mean to go."

X.

Binks had a consultation at 9 on the night of the dance. When his clerk told him that it was fixed for that evening and hour, he thought of writing an apology to Mrs. Sinclair; but he had a hankering to go, and the apology was not written. "After all," he said to himself, "if I go late, I shall get the sooner away." The consultation was a tiresome one. The client was docile enough, overawed by the importance of counsel, and anxious to hear what Binks had to say. But the agent insisted on monopolizing the talk, and Binks could hardly get a word in edgeways. The question was small, and the matter might have been knocked off in a quarter of an hour; but the agent was so anxious to show the client that he was getting value for the couple of guineas, that it was past ten o'clock before Binks bowed the gentlemen out. He returned to his room, pitched the papers impatiently into his bag, and then looked hard at the fire. Should he go to the dance?

"No; I'll be hanged if I stir out of here to-night;" and he picked up a pipe, and felt in the pocket of his jacket for his tobacco pouch. Instead of the tobacco pouch he drew out a small parcel in white paper.

"Hulloa, what's this? Oh yes, to be sure, those confounded gloves. Hang it all, I must go!"

Binks was a careful man. He had not bought a pair of white kids for a couple of years; but having bought them to-day, he was not going to throw them away.

It was a quarter to eleven when Binks reached Eglinton Crescent. There was nobody at the door of the drawing-room to announce him, and the hostess had left her place as the visitors had ceased to arrive. Binks was glad of it. He slipped into the room, lost himself in a small group of men who were standing near the door, and looked about him. Presently the music ceased, the dance was over, there was a rush through the doorway; the men who were standing beside Binks joined in the throng, and the lawyer was left alone in the corner. A short, stout, elderly man, who had been standing in a recess near the piano, bustled up to him, and clapping him on the shoulder in a cheery, familiar way, began,—

"What, come now, my good fellow, aren't you dancing?"

haven't you got a partner? My daughter, I am sure, will be"—

"Thanks; I hardly dance, and I have not the pleasure of Miss—ah—I'm afraid I don't know your name, sir," replied Binks, in his dryest and stiffest tone, for if there was one thing Binks barred, it was familiarity on the part of a stranger.

"You don't know my name, sir! well, neither do I."

"Dear me, how very remarkable!"

"I mean—you know quite well what I mean—who are you, sir?" replied Mr. Sinclair warmly, for if Binks was cool, Mr. Sinclair was peppery.

"Well, perhaps that's of no consequence."

"What, in my own house! I have heard of such things being done in Edinburgh—without an invitation," spluttered Mr. Sinclair.

"Oh, I beg your pardon," said Binks; "I was not aware that it was the host who addressed me. I am Mr. Binks, at your service."

"What, Mr. Theodosius Binks?"

"The same."

"Impossible! Mr. Theodosius Binks sits in our seat in St. George's Church."

"Then Mr. Theodosius Binks must be a somewhat irregular attender, as, I assure you, he has not been in St. George's Church for at least two years."

"Why, what's the matter, papa?" said a bright-looking girl, laying her hand upon Mr. Sinclair's shoulder.

"The matter, Rose, my love!" replied Mr. Sinclair, calming down at once; "why, this gentleman says that he is Mr. Binks."

Rose stared at Binks.

"Mr. Binks! well, it's not our Mr. Binks, at any rate."

"And who is your Mr. Binks, pray?" inquired Binks, half wishing it were he.

"Our Mr. Binks! why, Mr. Theodosius Binks, the advocate, to be sure."

"I am he."

The situation was an embarrassing one, but it lent itself to explanations. It appeared that a gentleman, whom Binks

readily identified as his professional brother, Thomas Glover, had a sitting in the Sinclairs' pew in St. George's Church; but, through some mistake in pointing out in the street, the Sinclairs had taken the idea, and held it all along, that Mr. Thomas Glover was Mr. Theodosius Binks. Mr. Thomas Glover was so exemplary in his attendance at church, and so uniformly courteous in giving place and passing stools and books, that Mr. Sinclair had insisted upon Mr. Theodosius Binks getting a card for the dance.

When Binks realized the situation, he at first insisted upon going away at once as an uninvited guest. Fifty Mr. Sinclairs would not have prevented him, but one Rose kept him.

Once fairly in for it, Binks tried to make himself as agreeable as was possible amidst such uncongenial surroundings. He walked through the Lancers, he even condescended once or twice to take a round or two in the waltz, but of course he drew the line resolutely at the polka. The general company did not interest him much, but as a student of physiognomy he was a good deal struck by the singularly handsome and yet careworn face of a tall, graceful girl, who seemed to take quite as little interest as himself in the pleasures of the dance. There was a dazed, far-away look about her which he had often noticed in the insane, but which was most remarkable in a young girl moving about in a ball-room. Binks inquired of some one who this girl was.

"Oh, she's a daughter of the house; but you'll make nothing of her. Awfully pretty, you know, but seems to have nothing in her—not a word to say. I remember them years ago in Glasgow, when they were kids, and she was such a bright, lively girl. Something came over her at school, and she has never been the same since."

To the surprise of nobody more than himself, Binks returned to the drawing-room after supper. He had still another dance upon his programme—that dance was with Rose Sinclair, who had been unable to give him one earlier, owing to the lateness of his application. It came at last, and it was the eightsome reel. Of course Binks did not dream of attempting to dance it. He had once, indeed, seen it danced, and that was enough. So he waited near the door when the

music struck up the warning notes, to catch Rose as she entered the room. She was a moment behind the general rush, and Binks, growing impatient, moved out on to the landing.

"Our dance, I believe?"

"Yes, Mr. Glover—er, Mr. Binks, I mean. Come along, we must get a place."

"But I don't dance the eightsome reel."

"Oh, nonsense; everybody dances the eightsome reel. Come, I'll put you through it. I would not miss it for the world."

Binks tried to protest, but in vain; he was literally dragged into the drawing-room, his knees knocking together with fright. Luckily for him, they were too late. Two sets were made up, and there was no room for more.

"What a pity," said Rose; "but it's my own fault, I suppose. Let us stand here and watch them."

They stood for a few moments; but this was poor sport for Binks, and he suggested that they should go somewhere and find a seat. The stair was crowded, which was a relief to Binks, with whose dignity and conventionalism a seat on the stair ill consorted. Rose led him up to the top of the flight, and then into a delightful little room, which they found unoccupied.

"And what room is this when it's at home?" inquired Binks.

"Oh, I really don't know how to describe it. We girls use it as a snugger, and for painting and general pottering about; don't you see the walls are all covered with our daubs?"

Binks glanced round, and saw that the room was profusely decorated with pictures—some framed, others unframed. Amongst them were a few framed photographs, and his eye rested upon one which he fancied he had seen before. It was too far off for him to be sure of it, and he crossed the room to look at it closely. It was the photograph of a house porch, with a group of girls, and underneath were the words, "Sea View House, 1875." Binks recognised it as the same as the photograph he had seen in Miss Oliver's house!

"I think I have seen that photograph before."

"Which?—oh, that one! That's a school at St. Andrews, where my sister Mary was. Had you any friends there?"

"No ; but tell me, was the sister you refer to the tall girl in pink downstairs ?"

"Yes ; that's her you see standing under the pillar, close to the mistress,—she was a great favourite of hers."

Binks looked carefully, and then recrossed and seated himself beside his companion.

"Miss Sinclair," he began, pulling nervously at the fringe of the sofa,—*"Miss Sinclair, I wish to ask you something."*

Rose changed colour. She had heard, and perhaps had some little experience, of swift conquests, but the rapidity of this fairly took her breath away.

"Yes, Mr. Binks."

"Your sister looks dull—can you tell me why ?"

Rose breathed a sigh of mingled disappointment and relief.

"How very sharp of you to notice that, Mr. Binks. Yes, she *is* dull ; but as to why, you would indeed be a benefactor if you could explain that ! Poor Mary, she used to be the brightest of us all."

"And has this lasted long ?"

"Oh yes, for years now, ever since she was at that very school at St. Andrews ; it began then, and she has never been the same person since."

"But did anything happen then to account for it ?"

"That I cannot tell. Something certainly happened that papa and mamma were very much annoyed about ; but it was never explained to me. All I know is, they are always dreadfully afraid of her walking in her sleep—a thing, so far as I know, she never did."

"Will you introduce me to your sister ?"

"With pleasure ; but—Of course you mustn't question her."

"Oh, surely you do not dream I would say anything to hurt her ?"

"Oh, I beg your pardon, of course not ; but the music has stopped. We must go down."

On returning to the drawing-room, Binks was duly introduced to the elder Miss Sinclair.

"Are you engaged for this dance ?"

"I was engaged, but my partner has become a fixture, I believe, in the supper room."

"Well, I am afraid I am too lazy to dance ; but your sister

has introduced me to a charming room—shall we stroll upstairs ? ”

Binks was in luck, for again the room was unoccupied.

“ I recognised a photograph over there,” he began.

“ Oh, that one ? that’s a place near Dollar an uncle of mine had for several summers.”

“ That was not the one I meant. But tell me, is your uncle’s name Russell ? ”

“ Yes ; do you know him ? ”

“ I do not ; but I suppose that is where you lost your ring ? ”

“ Yes ; but what do you know about that ? ”

“ I have heard the story, but I did not connect you with it until this moment.”

“ How very odd ! How clever you are ! ”

“ No ; but the photo I recognised was that one of the group of girls at the schoolhouse door—Miss Oliver’s school at St. Andrews, I see.”

Miss Sinclair’s face had brightened up wonderfully as they talked of Dollar, but it darkened down again to settled gloom the moment St. Andrews was referred to.

“ Yes, that was Miss Oliver’s school.”

“ You were there in 1875 ? ”

“ I was.”

“ I was over at St. Andrews the other day, and I looked through the house, which is at present to let. I thought a good deal of the house. What a jolly bedroom that is on the second storey, looking into the garden and over the wall beyond down towards the sea ! ”

“ That was my room.”

“ I took a walk one day out to a picturesque village called Strathkinnes, three or four miles away. Do you know it ? ”

Binks looked at his companion keenly, but unmoved she replied,—

“ No, I was never there.”

“ I met a man who told me a curious story about an old woman who used to scramble about these garden walls near Sea View ; did you ever meet an old woman there ? ”

Miss Sinclair made no reply ; a vacant, misty look lay upon her eyes ; she seemed like a person, half awake, still striving to retain around her the creatures of the dream-world.

"An old woman," said Binks; "don't you remember an old woman?"

Miss Sinclair pulled herself together. "I would rather not discuss this, Mr. Binks. I had once a strange dream about an old woman, and what you say unpleasantly recalls it. Let us go downstairs."

"Stay one moment, Miss Sinclair. I know I am treading on delicate ground. But perhaps I can clear up the matter. Tell me, was there any writing in this dream?"

Miss Sinclair started, and with more animation than she had yet shown, she asked,—

"How in the world do you know that?"

"I don't know it, I merely guessed it."

"Yes, yes, there was writing. I wrote down something to remind me of something else; but, of course, as it was only a dream, the writing was lost; and oh, Mr. Binks, if you knew how that has hung about my soul all these years;" and the tears started to her eyes.

Binks made no reply for a moment, but, taking his dance programme from his pocket, he scribbled something on the back of it, and handed it to Miss Sinclair.

"Tell me, was that what you wrote?"

"Ring under stone V. B. B. C." She read it over three times, each time with greater eagerness.

"Yes, yes, I do believe that is what I wrote," said Miss Sinclair in a husky whisper. "But where did you find it?"

"I will explain that again; but first tell me, can you interpret these cabalistic words, V. B. B. C.?"

"V. B. B. C. There is something vaguely in my mind." She pressed her fingers to her forehead, and was silent for a little. Then she said, slowly and confidently,—

"V. B. is Vicars Bridge."

"And the B. C.?"

"There is a copestone on the east parapet with the letters 'B. C.' upon it. The boys, my cousins, used jocularly to point out that stone as incontestable evidence of the great antiquity of the bridge."

XI.

Next morning, Mr. Alexander M'Klink, advocate, received

a note from Binks, requesting him to be so kind as to take a couple of motions, and get a Procedure Roll case put off, as Binks had been called suddenly to the country on important business.

M'Klink, being obliging, did the necessary work, and being a gossip, with abundance of leisure, he spent the forenoon at the fireplace retailing the incident of Binks' letter, with this oft-repeated comment—"We all know what that means!"

Meanwhile Binks was on his way to Dollar. He reached that station early in the forenoon, and half-an-hour's walk brought him to the Vicars Bridge over the Devon. The parapet copingstone, with B. C. in large letters upon it, was there as Miss Sinclair had told him; but there was nothing else to suggest that the bridge dated from before the Christian era. On the contrary, everything was spick and span, and Binks searched the wall under the stone in vain for cranny or crevice which might contain the ring. This was a keen disappointment. It occurred to him that perhaps the ring might have been secreted by reaching over on the other side of the wall. He reached over, therefore, and felt round below the stone, but he discovered nothing. He leant further and further over, peering about and passing his hand along the lime between the stones. At last he had reached so far over that his feet were off the ground, and he was hanging across the parapet—his legs on one side, and his head, arms, and shoulders on the other, just as if he had been a drunk man hung out to dry.

Suddenly Binks felt a violent tug at his coat-tails, which pulled him fairly back staggering on to his feet on the road. He turned sharp round, and a burly workman stood before him.

"What do you mean, sir?" demanded Binks.

"Mean is it! Mon, are ye clean demented? I thoct ye was gaun ower a'thegither."

Binks could not give a quite satisfactory account of himself, but he weakly muttered something about examining the bridge; and then a bright idea striking him, he asked the man, who looked like a mason, if he knew when last the bridge was pointed.

"Pinted! no' sax months syne. I was at the job mysel'."

"You didn't find anything when you were about the job?"

"Find onything! No; what wud a body find aboot an auld brig?"

"Well, I don't know; but I once heard some story about a ring being hid about here, and never found again."

"A ring, did ye say? That minds me noo, I did find an auld bit ring in a hole atween twa stanes, jest whaur ye was hangin' ower the noo; but it was a' black, and I thocht it was yin o' yer travellin' tinker's tuppenny ha'penny gee-gaws. The ainly queer thing was hoo in the warld it had gotten intae that hole in the brig."

"And what did you do with it?" gasped Binks.

"Do wi't? I dinna mind noo; it's like eneuch I tuk it hame to the missis."

Binks was not long in discovering that the mason, whose name was Bryce, lived at Blairingone village, not a mile distant, and he persuaded the man to accompany him thither. They found Mrs. Bryce a stout, pleasant-looking, middle-aged woman, busy with her house work, but she made the stranger welcome.

"Ye'll mind, Mary Aun, yon auld ring I bracht ye hame yin day frae the brig?"

"Aye; but what aboot it? It was a gilt ring wi' wee gless stanes, was it no?"

"You haven't lost it!" exclaimed Binks.

"Na, na, I hae it a' safe, if it's o' value tae onybody."

"It'll be ben the hoose, in yer wardrap drawer, I'm thinkin'," said Bryce. "I'll gang ben and fetch it."

"Ye needna fash, Jeemes; it's no' ben the hoose."

"Whaur is't, then? let the gentleman see't, wull ye no'?"

Mrs. Bryce coloured, but made no reply.

"My good woman, don't be afraid, I won't steal it from you, I assure you; but I'll make it well worth your while to sell it me," said Binks.

"Gudesake, what ails the wumman?" exclaimed the astonished husband.

"I'll gang ben the hoose and fetch it," said Mrs. Bryce at last.

"But ye said twa minnits syne that it wasna ben the hoose. I dinna ken what's ta'en the wife."

Mrs. Bryce said nothing, but disappeared from the kitchen. In an instant she returned with a garter in her hand; and then Binks understood why the lady had been so coy. The garter was an elastic one, fastened with a ring and button; and the ring—yes, there sewn into the garter of this peasant woman—was the ring which Mary Sinclair had got from her dead sister, which Cooper had hid at the Vicars Bridge, which Binks had searched for at Strathkinnes—the ring which had driven Cooper to the madhouse, and brought Mrs. M'Ara to the grave, had blighted all Mary Sinclair's youth, and had shed a flood of romantic light round the prosaic life of that pragmatical Edinburgh lawyer, Theodosius Binks!

XII.

The news of the discovery of the ring had a most beneficial effect upon Cooper. A cloud seemed lifted from his mind. He did not recover all at once, and he is still deemed peculiar. But he has long been discharged from all restraint; he maintains himself by private coaching, and he has taken to literary labours, in which he may yet make his mark.

It was a proud moment for Binks when he restored Mary Sinclair her ring—indeed, there was but one happier incident in his life, and that was when he gave her sister Rose a ring.

Appointments.

SIR CHARLES J. PEARSON has been appointed Sheriff of Perth, in room of Sheriff Gloag (now Lord Kincairney), recently raised to the Bench. Sir Charles succeeded Lord Wellwood as Sheriff of Bute and Renfrew, and is at present Procurator for the Church of Scotland. He was called to the English Bar (Inner Temple) in 1870, and was admitted to the Faculty of Advocates in the same year.

SHERIFF CHEYNE (1865), of Ross, Cromarty, and Sutherland, has been appointed to the Sheriffship of Renfrew and Bute, in room of Sir Charles Pearson.

MR. ALEXANDER LOW, Advocate (1870), has been appointed Sheriff of Ross, Cromarty, and Sutherland, in room of Sheriff Cheyne.

MR. ALEXANDER BLAIR, Advocate (1860), Sheriff of Chancery, has been appointed Sheriff of Stirling, Dumbarton, and Clackmannan, vacant by the death of Sheriff Muirhead.

MR. DUGALD M'KECHNIE, Advocate (1870), has been appointed Sheriff of Chancery.

MR. CHARLES MACONCHIE, Advocate (1876), has been appointed an Advocate-Depute, in room of Mr. M'Kechnie.

MR. JOHN HENDERSON BEGG, Advocate (1870), has been appointed Sheriff-Substitute at Greenock, in room of Sheriff Nicolson (1860), resigned. Mr. Begg is the author of the well-known works, "The Conveyancing Code," and "A Treatise on Law Agents."

MR. JOSEPH CAMPBELL PENNY, C.A., has been appointed Accountant of Court under the Judicial Factors (Scotland) Act of the present year, which comes into operation on 1st January next.

Correspondence.

(To the Editors of the *Journal of Jurisprudence*.)

SIR,—In the "Editorial" of the November number of the *Journal of Jurisprudence*, a writer makes merry over the Latinity of Parliament House, which, as he thinks, was shown in reference to the motto of a notary-public, "Fortis fortuna adjuvat." (The editorial writer thinks it better to alter even the order of the words, and gives us "Fortuna fortis adjuvat;" the metres of the comic poets must be trifles to him.) He has not been even quite so merry as he might have been, for the anxious inquiry came from more than one quarter, "What

case does 'adjuvo' govern?" "Pundits," it is true, have many prejudices, of which one is this, that they fancy Cicero used to say "adjuvo."

It is well open to doubt if it is wise to enter into the merits of the dispute with one who talks lightly of "mediæval monks," pleased with the somewhat unmeaning jingle of his own alliteration, and thinks of no import the scholars of "the Fatherland," a knowledge of whose language is a first requisite for the equipment of the scientist, be it in Latin, be it in Law.

The learned editorial authority on everyday Latin has evidently failed to notice the history of the motto. It occurs in the Phormio of Terence (I. iv. 25), and in two English editions lying nearest to hand, those by Wagner and by Davies, both the work of scholars, it is given "*Fortis fortuna adjuvat.*" The accusative plural in *-is* is perfectly well known, and Mr. Roby, in his "*Grammar of the Latin Language from Plautus to Suetonius*," states that it is *-es* or *-is* "indifferently."

If a little editorial leisure were spent on the subject, the writer might perhaps come to say, with Cicero, "*Fortis enim non modo fortuna adjuvat, ut in vetere proverbio, sed multo magis ratio, quæ quibusdam præceptis confirmat vim fortitudinis.*" At present "*vis fortitudinis*" has been shown more than "*ratio.*"

L.

Obituary.

THE LATE PROFESSOR MUIRHEAD.—It is with deep regret that we have to record, since our last issue, the death, at the comparatively early age of fifty-eight years, of James Muirhead, Sheriff of Stirling, Dumbarton, and Clackmannan, and Professor of Civil Law in the University of Edinburgh. To the Bar and the University the loss is great; to his friends it is irreparable. That he stood unique in the Faculty is clearly indicated by the difficulty in choosing a fit successor from his brethren, practising though they do a law founded on that which he professed.

Born in 1831, James Muirhead was called to the English Bar in 1857, in which year he was also admitted a member

of the Faculty of Advocates. In 1862 he was elected Professor of Civil Law in the University of Edinburgh. In 1874 he was appointed one of the Conservative Advocates-Depute; and in 1880 he followed Lord M'Laren as Sheriff of Chancery. That office he vacated in 1885 on being appointed Sheriff Principal of Stirling, Dumbarton, and Clackmannan, as successor to Mr. Gloag, who was transferred to the Sheriffdom of Perth. Though never in what could be called large practice at the Bar, he obtained a fair share of the best kind of work in the Parliament House. A discreet and able Advocate-Depute, he was a patient and a sound judge, earning by his thoroughness, and by his unfailing courtesy and good nature, at once the confidence and the esteem of the practitioners and suitors in the various Sheriff Courts throughout his jurisdiction. The graceful tribute paid to his worth by his Substitutes in the various counties, is but an echo of the regard in which he was held by all who came in contact with him as judge or as administrator of county affairs.

But it has been truly said that as Professor of Civil Law he will be best remembered, and that as such his reputation is more European than British. Whether he is regarded as a teacher or writer on Civil Law, it is impossible—at least in this country—to find his equal at the present day. Imbued with a keen love of his subject, and deeply read in the history of Rome, he rendered his class, which the bulk of law students are apt to regard as merely a compulsory one, to be got through anyhow, perhaps the most interesting of the legal curriculum. To anxious inquirers in the retiring room he was ever prodigal of time and knowledge. As a legal writer he is most widely known. His edition of the text of Gaius (1880) is acknowledged by civil lawyers to be the best hitherto published. His historical introduction to the Private Law of Rome, originally written as an article for the *Encyclopædia Britannica*, and published as an independent work in 1886, has been translated into French, German, and Italian, and is widely used in the three countries. In recognition of his merit as a writer on the law of Rome, he was elected an honorary member of the Judicial Society of Berlin, and received the degree of Doctor of Laws from the University of Glasgow.

A safe adviser, a warm friend, a ripe scholar, and a sound judge, he leaves only friends in a place where petty spite and jealousies are so apt to abound.

THE LATE MR. JOHN JAMES REID, ADVOCATE,—Death has been busy in the ranks of the Bar; in addition to the learned civilian to whom we have referred above, we have to chronicle our sense of the loss sustained by the removal of Mr. J. J. Reid, Queen's and Lord Treasurer's Remembrancer. It is a loss which will be felt all the more by his friends, as, despite three years' ill-health, his sustained cheerfulness and patient endurance gave hope that he had still before him some years of a useful, if not an active life.

John Reid—to call him by the name by which he was best known—was born in 1844, in Corfu, his father having been a member of the Supreme Legislative Council of the Ionian Islands. He was educated at Cheltenham, and afterwards went to Trinity College, Cambridge, where he graduated. After going through the usual law classes in the University of Edinburgh, he was called to the Bar in 1870. Attached by early ties to the Liberal party in politics, he was, about 1875, appointed honorary secretary of the East and North of Scotland Liberal Association, and the result of the General Election in 1880 justified the choice. When his party came into power, he was made an Advocate-Depute, but was not long in the Crown Office, as he was soon after appointed to the office of Queen's Remembrancer, which he held till his death.

Such, in brief, was Mr. Reid's career; but something more is needed to give some understanding of the man himself, for he was no mere political hack, content to do the work of his party for the sake of the rewards it brought; nor was he the narrow-minded official, his view confined by the limits of his daily task. On the contrary, Reid had a distinct and interesting personality; when you talked with him, you felt that whatever the estimate might be that you formed of him, one thing was at least clear, that he was not a man moulded on merely conventional lines, but that he had opinions and ideas of his own, which he was not afraid to express. You might be sure, too, that he would express them temperately, and with the feelings of a gentleman.

When Reid came to the Bar in 1870—one of, alas! a now rapidly narrowing circle of seventeen—he brought with him a reputation from school and college of having a high place in the athletic world. He was a champion racquet player, an excellent cricketer, and, even down to the time when his health gave way, only wanted regular practice to make him a tennis player of high rank. Athletics, however, do not, unfortunately, help a young advocate in his professional career, and Reid, like many another man who has ultimately succeeded, found the first few years of his life at the Bar but tedious work. But he made many friends; indeed, few who met him, either in the Parliament House or in the more genial moments of social relaxation, could fail to be attracted by him. Some people, no doubt, thought him egotistical; but his was not the egotism of vanity, for few men have been less vain; still less that of selfishness, for a more unselfish man never lived; but was the outcome of a peculiar attitude of mind towards matters in general, and an unconventional frankness of disposition, which were quite consistent with the most perfect simplicity of heart. So it came to be, we say, that Reid made many friends, irrespective of political party. But it was owing to politics that he got his chance. The Liberal party had fallen into a state of disorganization, and when he became secretary of the Association he had everything to do in the way of putting his party in a position to avail themselves of their resources. It was here that his habits of method and accuracy came to his aid; and it was no doubt largely due to his exertions that his party were successful in the Scottish elections of 1880. His services were not unappreciated, and he was, in recognition of them, presented with a handsome piece of plate.

When he was made Advocate-Depute, his sphere of work, of course, was completely changed, and was not so congenial, either to his talents or his tastes. But when the Queen's Remembrancership fell vacant, owing to the transfer of Mr. Stair Agnew to the office of Registrar-General, his appointment to that post again gave his particular abilities full scope. His career as a public servant was in every way satisfactory. Courteous to every one, he inspired feelings of personal regard in all his staff, and no one who was ever brought into contact

with him in the way of business, had ever to complain of lack of attention.

But it is not as the political secretary nor the high Government official that John Reid will be best remembered. It is as the personal friend that most will think of him. Always bright and interesting, always with plenty to say for and of himself, no more cheerful man could be met, either as he walked with you behind the dogs on the moor—for he was a shot of no mean capacity—or sat with you over a cigar beside the fire on a winter night. His talk would range over all kinds of subjects—where he meant to travel (he had enough of travel, poor fellow, in the end), what was the next paper he was going to read before the Antiquaries, or the merits of the last addition to his library. The latter was a pet hobby of his, and his shelves contained specimens of books which are hard to come by—not so much old books, though he was an enthusiastic antiquary, as books which from fortuitous circumstances had got scarce, and were valued accordingly. Many a volume was there which made the book-lover's mouth water as his eye fell on them, arranged in rows with a neatness and method characteristic of their owner. He never himself made any very important contribution to literature, but he prided himself on having rescued from oblivion many fugitive pieces in circulation in the Parliament House, and on having edited them, along with the present Treasurer of Faculty, in a book which now sells at four times its original price. To the Society of Antiquaries—of which he was a member of Council—he contributed several interesting and valuable papers, amongst which may be mentioned a description of some very elaborately carved panelling he had been fortunate enough to rescue from oblivion at Montrose, early notices of the Bass Rock and its owners, and other family and topographical papers.

It is sad to think that this useful and many-sided life should have come to such an early close. But so it is; after battling bravely with the ravages of a protracted and insidious malady, which every now and then relaxed its grasp, and gave hopes of improvement, if not of recovery, he passed quietly and peacefully away, surrounded by those he loved best, and leaving in the hearts of his friends many warm memories.

MR. JOHN MURRAY, Solicitor and Notary-public in Campbeltown, died on 8th November. Mr. Murray had an extensive practice. He was Procurator-Fiscal for the burgh of Campbeltown, and an Honorary Sheriff-Substitute for the county of Argyle.

MR. WILLIAM AULD WILSON, Solicitor in Rothesay, died there on 11th November.

MR. ADAM ROLLAND, W.S., died in Edinburgh on the 20th November. Mr. Rolland was 87 years of age, and was admitted to the Society of Writers to the Signet so long ago as the year 1824.

The Month.

Consolidation and Repeal.—It is right that both lawyers and the public generally should recognise that useful work in consolidating statutes and repealing obsolete enactments is quietly proceeding. Thus, the brief Factors Act, 1889 (52 and 53 Vict. c. 45), repeals four previous statutes. Four Acts, and parts of others, are repealed by the Revenue Act 1889 (c. 42). Eight, and parts of many others, were repealed by the Commissioners for Oaths Act (c. 10). No less than twenty-two Acts are included in the Schedule of Repeals of the Master and Servant Act, 1889 (c. 24), but some of those statutes had been already repealed, and are only mentioned for convenience, and some are only repealed in part. Two Acts and three stray sections are repealed by the Trust Investment Act, 1889 (c. 32). No doubt less has been done this year than last by the County Courts Act, 1888, the Mortmain Act, 1888, and the two great Statute Law Revision Acts; but still, some good work has been accomplished. We wish, however, that repeals could be effected without such wide general savings, which sometimes make a practitioner hesitate whether he ought not to consult all the repealed statutes on the subject with reference to which he seeks to ascertain the present law.—*Law Times*.

Banffshire Contingencies.—The following clause occurs in a Banffshire trust disposition and settlement, connected with a case at present before the Courts:—"Fourth. I direct my said trustees, and the acceptors or acceptor, survivors or survivor of them, at the death or marriage of my said beloved spouse, Mrs. —, whichever of these events shall first take place, or if at any time my beloved spouse shall, contrary to my expectation, cease to continue a virtuous life, to sell," etc.



A Fine Distinction.—It has been decided by the Court of Quarter Sessions of Alleghany County, Pennsylvania (by Stowe, P.J.), that, under the statute of that State, it is lawful for a man to *deliver* milk on a Sunday, but that it is unlawful for him to *sell* it on that day!



THERE is a grim humour about some of Judge Lynch's executions. A bank president in south-western Texas made away with all the funds under his charge, and then posted on the door of his institution, "Bank Suspended." That night he was interviewed by a number of depositors, who left him hanging to a tree with this notice pinned to his breast, "Bank President Suspended."—*The Green Bag*.



Jury Challenging in the Cronin Case.—The statutes of the State of Illinois provide that, if a person had read an account in a newspaper of the crime with the commission of which the accused is charged, it shall not be allowed to challenge him as a juror, if he states on oath that he believes he can give an impartial verdict according to the sworn evidence. In the Cronin case the presiding judge has permitted the following four questions to be put to proposed jurors who had read newspaper reports: "Do you believe that Dr. Cronin was driven away in a buggy hired from stableman Dinan by Coughlin? Do you believe Burke was one of the tenants of Carlson cottage, and that Dr. Cronin was killed there? Do you believe Dr. Cronin was killed pursuant to the appoint-

ment of the trial committee in Camp 20 of the so-called Clann-na-Gael Society? Do you believe a conspiracy had been formed, and that any of these defendants belonged to that conspiracy?" According to Hawkins' "Pleas of the Crown," in England a juror may be examined on the *voir dire* as to his qualification or affection, but not as to matters tending to his own discredit, nor as to having expressed an opinion as to the guilt of the defendant. But in the case of *Reg. v. Cuffey*, tried at the Central Criminal Court in September 1848, in which the prisoners were charged with treason felony under 11 Vict. c. 12, the latter question was asked, the Attorney-General not taking objection on behalf of the Crown.



Changes in Professional Business.—The following remarks by Mr. Brooks before the Ohio State Bar Association are applicable to the state of the profession in England and Scotland:—"The purely intellectual character of the profession, as distinguished from the sensational or muscular, becomes more marked every day. Now, more than heretofore, its prizes are won by those who ceaselessly read and think. A few years ago a great advocate was the great lawyer. He was ruler of the twelve—King in slander, breach of promise, and murder. Court rooms were crowded when he rose to speak; bar rooms were stifled when he went to drink. The eye of admiration and finger of notoriety followed him on the street. Now mark the change: Agriculture is no more the chief employment. Its quiet ways are succeeded by the stunning roar of manufacture and trade. . . . Capital and labour have each become organized, and vast corporations have been created to gain, save, and insure property. Money, not philanthropy, is the aim of these great institutions. They have no use for a lawyer who can only guess, talk, or fight. The lawyer who can serve them does it by thinking and writing. He is wanted to keep them out of trouble, as adviser, not as pleader; in the office, not in the Court room. I was surprised a few years ago to hear a distinguished lawyer say he had not argued a case in Court for years, yet he was in practice all the time, and had won a million at the Bar."

Reviews.

An Analysis of the Universities (Scotland) Act, 1889. With the Act itself, the Act of 1858, and an Index. By J. N. MORTON, M.A., Writer, Glasgow. Edinburgh: Blackwood & Sons.

MR. MORTON'S handy little work will be of service to the wide circle of people in Scotland who are interested in the long - expected Universities Act. Within very moderate compass, and in a convenient form, the work contains all the matter necessary to enable any one to understand the provisions of the Act, and the system which it is designed to alter and to improve. The Introduction is lucid and concise, and there is a good and ample Index.

The Acts of 1889, in so far as affecting the Education Acts for Scotland: Being a Supplement to "Sellar's Manual of the Education Acts." By J. EDWARD GRAHAM, Advocate. Edinburgh: Blackwood & Sons.

THE legislation of the last session had important effects on education in Scotland. The Local Government Act, it is true, in concentrating authorities, left the School Boards untouched; but, nevertheless, one of its provisions which attracted most attention dealt with education—that, namely, providing for, and authorizing, the remission of school fees. Then sect. 3 of the Prevention of Cruelty to, and Protection of, Children Act, 1889, directly affects the Education Acts. Lastly, the Parliamentary Grant (Caithness and Sutherland) Act, 1889, was passed last session in order to remove a difficulty which had arisen in regard to the extra grant given in these counties. These various enactments have rendered necessary a Supplement to Mr. Craig Sellar's valuable "Manual." Mr. Graham, by whom the eighth edition of the "Manual" was revised, and in great part re-written, has now supplied an Appendix which deals with these matters. The

sections of the statutes referred to, in so far as they bear on the Education Acts, are given, with explanatory notes; and the Circular and the Minute of the Education Department regarding the remission of fees are added. The Appendix shows the care which characterized Mr. Graham's former work.

The Provisional Council (Local Government (Scotland) Act, 1889): A Handbook to the Constitution and Election of the First County Council, and the Regulations Governing its Provincial Proceedings: together with the Provisional Electoral Divisions. By A. J. P. MENZIES, Advocate. Edinburgh: Green & Son.

MR. MENZIES has written for a transient and fleeting body—a body which will exist from the 13th February until the 15th May 1890, and will then pass away for ever. Yet to the Provisional Council under the Local Government Act are entrusted not unimportant duties. They are to “arrange to bring this Act into operation.” The work under review has been written “with the object of supplying a convenient handbook for those interested in the work of starting the County Councils, whether as candidates or electors.” The wisdom of restricting the handbook to the Provisional Council is doubtful. The book will be adequate neither for the successful candidates nor for the said electors—unless death considerably step in and obviate the necessity for all further concern in the details of the Act. By sheer survival, the Provisional Councillor will, on the 15th May 1890, develop into a fully-fledged County Councillor; and he will then awake to find that Mr. Menzies' handbook, hitherto his faithful guide and support, can guide him no further through the mazes of county administration, but will abandon him abruptly and unfeelingly at the very point where his work really begins. The elector, too, who survives till distant December 1892, and who pays his rates, consolidated and poor, will then take down Mr. Menzies' book from his shelf, shake from it the accumulated dust of well-nigh three years, and discover that it deals only with the arrangements for the *first* election. Within its restricted scheme, the book may

be useful. It consists of a re-arrangement of the sections of the Act which bear on its subject, together with sections of adopted or amended statutes. These are annotated, on the whole, with care and accuracy, and extend to 50 pages. No less than 98 pages, however—out of a total of 172, including index—are given up to a reprint from the *Edinburgh Gazette*, of the Provisional Electoral Division for the Election of the First Council!

Procedure in the Court of Session. By J. P. COLDSTREAM, W.S., Lecturer in the University of Edinburgh on Civil and Criminal Procedure in the Superior and Inferior Courts of Scotland; Extraordinary Member, formerly one of the Presidents, of the Juridical Society of Edinburgh. Fourth Edition, Enlarged and Revised, Edinburgh: T. & T. Clark. 1889.

THE appearance of a new edition—revised, enlarged, and brought up to date—of Mr. Coldstream's well-known book will be welcomed by practitioners. The work is a sound and a most useful one, by a gentleman who had exceptional opportunities of becoming practically acquainted with his subject. In size and degree of completeness, Mr. Coldstream's treatise supplies (as its success has shown) a real want on the part of many for whom Mr. Mackay's great work may be too elaborate.

English Decisions.

OCTOBER.

(All current English decisions likely to throw light upon any point of Scottish law or practice are here reported.)

PARTNERSHIP.—*Arbitration clause—Staying proceedings.*—Plaintiff and defendant were partners. Plaintiff brought an action against defendant for an accounting of the partnership dealings under the articles of copartnery, and to have the partnership wound up; as also to have a receiver appointed. It was moved for defendant that all further proceedings in the action might be stayed, and that all differences regarding the construction of the articles of partnership, or any account, etc., should be referred to two arbitrators or

their umpire, conform to a clause in the said articles. Mr. Justice Kay decided that the arbitrators had no power to decide whether or not the partnership should be dissolved, and that the Court could not give them such power; that the question of dissolution was one for the High Court; that therefore the action could not be stayed; that defendant's motion must stand until the trial of the action; and that there must be a reference to Chambers for the appointment of a receiver. *Held* (by Lords Justices Cotton, Bowen, and Fry, affirming Mr. Justice Kay, but without deciding that an action could never be stayed when a dissolution of partnership was claimed), that the defendant's motion must stand until the trial of the action.—*Joplin v. Postlethwaite*, Ct. of App., 24 October 1889.

SHIPPING. — *Charter-party—Lay days—Demurrage.* — A charter-party provided that a vessel should proceed to Constantinople, and as there ordered, within six running hours of arrival (or lay days to count), to Odessa, or so near thereunto as she might safely get, and there load, always afloat, from the factors of the freighters a complete cargo of wheat—twelve running days (Sundays excepted) to be allowed the freighters for loading and unloading, and ten days on demurrage over and above the said lay days. A dispute having arisen between the charterers and the owners of the steamship as to when the lay days commenced, the matter was referred to arbitration. The arbitrator found that the vessel reached Odessa outer harbour, and as near as she could get to a loading berth, on the 22nd December 1888; that the charterers received notice on that day from the captain that the steamship was ready to receive cargo; that the cargo was then ready to be loaded, and that the charterers were then ready and willing to load the same if and so soon as the steamship got a loading berth alongside a quay in the inner harbour at Odessa, where the cargo was stored, but not before; that there was no practicable means of loading the vessel at Odessa, except at or alongside a quay berth, either in the inner or outer harbour; that the harbour-master at Odessa refused to allow the vessel to go to a loading quay berth either in the outer or inner harbour at Odessa until her regular turn came after the ships which had arrived before her; that there was at that time no custom at Odessa that steamships under charter were only considered ready to receive cargo when moored alongside the quays; that the vessel was ordered in her turn by the harbour-master to a quay loading berth on the 8th January 1889; that the charterers began to load her on the 10th January 1889; that the loading was completed on the 15th January; and that the lay days of the vessel expired on the 5th January. On these findings the arbitrator awarded the owners £456, 16s. for demurrage and detention of their ship. *Held* (by Baron Huddleston and Mr. Justice Mathew, on motion to set aside the award), that the award was good; that the lay days began to run from the arrival of the vessel as near as she could get to a loading berth in the outer harbour at Odessa.—*Re Arbitration between Pyman & Co. and Dreufus & Co.*, High Court, Q. B. Div., 25 October 1889.

SHIPPING.—*Charter-party—Consignees—Bill of lading.*—The cargo of plaintiffs' steamship was to be delivered to defendants, the consignees under the bill of lading, on their "paying freight and all other conditions as per charter-party." In the charter-party there occurred the provision: "The cargo to be loaded as customary at Fowey; if longer detained, demurrage at £9 a day." The steamer having been detained three days at the port of loading, plaintiffs claimed demurrage. On her arrival at the port of discharge, defendants claimed delivery of the goods under the bill of lading, and repudiated all liability for demurrage. A part of the cargo was delivered to defendants, the remainder being retained by the master under a claim for lien. Plaintiffs sought to recover the sum of £27 in the County Court from the defendants on an implied contract to pay demurrage, but were non-suited. *Held* (by Baron Huddleston and Mr. Justice Mathew, affirming the decision of the County Court judge), that there was no implied contract by the defendants to pay demurrage, the master having delivered to them after repudiation; and that the case of *Wegener v. Smith* (24 L. J. 25, C. P.) was distinguishable.—*Steamship County of Lancaster v. Sharpe & Co.*, High Court, Q. B. Div., 26 October 1889.

DIVORCE.—*Desertion—Adulteress brought to house by husband.*—Parties were married in 1866. In 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her; and after remaining a short time, informed her husband that either she or the woman must leave the house. The husband said she might do as she liked, but that the woman would remain; whereupon the wife left, and did not again cohabit with her husband. *Held* (by Mr. Justice Butt), that the husband was guilty of deserting his wife.—*Dickinson v. Dickinson*, High Court, P. D. & A. Div., 28 October 1889.

COMPANY.—*Winding-up—Creditor—Garnishee order—Companies Act, 1862, sec. 82.*—A company owed a sum of money to W. A creditor of W.'s (A.) recovered judgment against him. A. obtained a garnishee order absolute, directing the company to pay him the £38. The company having refused to do so, he presented a petition for winding it up, alleging that he was a creditor for £38. *Held* (by Lords Justices Cotton, Bowen, and Fry, affirming Mr. Justice North), that the garnishee order absolute did not transfer the debt from W. to A.; that W. remained the creditor of the company, although A. had the right to receive the amount; that therefore A. was not a creditor of the company, and was not entitled to present a petition to have the company wound up.—*Re Combined Weighing and Advertising Machine Company*, Ct. of App., 28 October 1889.

EXECUTOR.—*Advertisement for creditors—Sufficiency of advertisement.*—The executors under the will of a Lancashire farmer inserted the usual advertisement for creditors against his estate, under the Act, 22 and 23 Vict. c. 35, s. 26, once in the *London Gazette*, and once in each of two Lancashire weekly papers, and in one Lancashire bi-weekly paper, but in no London or local daily paper. In a claim

against the surviving executor, on the ground that the advertisements were insufficient, by a person alleging that the estate was liable to her in respect of certain trust money, *held* (by Lords Justices Cotton, Bowen, and Fry), that the advertisements were sufficient, and that no claim could now be sustained against the executor.—*Re Bracken: Doughty v. Townson*, Ct. of App., 29 October 1889.

BUILDING SOCIETY.—*Alteration of rules—Arbitration clause—Withdrawing member.*—A building society was founded in 1866 under certified rules, which provided that, when giving notice of withdrawal, a withdrawing member should cease to be a member of the society; that a body of five arbitrators should be appointed at the first meeting of the society; that all disputes should be referred to the arbitration of three arbitrators, chosen by lot from the five so appointed; and that rules might be altered by the society as therein provided. The plaintiff in this action became a member of the society in 1880. In April 1887 he gave notice to withdraw. In June 1887 the society was incorporated under the Act of 1874. In January and February 1888 the rules were duly altered, and new rules added, and on April 19, 1888, the alterations and new rules were incorporated by rescinding the old rules and passing a new set. The new rules provided that a withdrawing member should not cease to be a member on giving notice; that a body of five arbitrators should be appointed at any meeting of the company, and all disputes referred to three of them. A dispute having arisen between the plaintiff and the company as to the amount due to him in respect of his shares, he commenced an action for an account by writ, dated the 17th April 1889. After the issue of this writ, the society appointed five arbitrators at a general meeting, and took out a summons, which now came on to be heard, to stay all proceedings in the action, and that all matters in dispute between the plaintiff and the society might be referred to arbitration under the rules. *Held* (by Mr. Justice North), that without deciding the question whether the plaintiff was or was not bound by the new rules, as to which the Court felt great doubt, both old and new rules contemplated reference to arbitrators chosen by lot from a body previously appointed by the society, not from a body appointed *ad hoc* after the dispute had arisen; that there was no properly appointed body of arbitrators in existence, and therefore the summons must be dismissed.—*Christie v. Northern Counties Building Society*, High Court, Ch. Div., 30 October 1889.

BUILDING SOCIETY.—*Borrowing—Construction of 37 and 38 Vict. c. 42, sec. 15.*—A building society borrowed moneys in excess of its powers, and the liquidator brought an action in the name of the society to set aside certain mortgages, on the ground that they were *ultra vires* by the Building Societies Act, 1874. A point of law set down for the decision of the Court before the hearing the action, arose on the construction of the 15th section of the Building Societies Act, 1874. It is thereby provided, with respect to the borrowing of money by building societies, that in a permanent

society the total amount received on deposit or loan and not repaid by the society shall not, at any time, exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. The question was, whether the words "amount for the time being secured to the society by mortgages" included only the principal advanced, or not only the principal advanced but also interest, fines, and all other payments outstanding and due on the face of the mortgage. The mortgages were made for terms of years, and the principal and interest were blended together and made repayable by a number of instalments spread over the number of years of the respective terms. It was contended that the words "amount secured" must be construed as only including the principal sums secured, and not comprising interest, fines, and other payments due under the mortgages. *Held* (by Mr. Justice Chitty), that the words "amount secured" must be taken as covering all sums due on the mortgage security for principal, or interest, or fines, or otherwise due, and all instalments accrued, due and outstanding; and that that view was supported by the somewhat analogous case of *Laing v. Reed* (L. Rep. 5 Ch. App. 4).—*Neath Permanent Building Society v. Luce*, High Court, Ch. Div., 30 October 1889.

TRACTION ENGINE.—*Highway—Nuisance—Locomotive Acts* 1861, 1865.—*Held* (by Lord Esher, M. R., and Lords Justices Lindley and Lopes), that a right to recover damages for injury sustained in consequence of the use upon a highway of a locomotive, which is so constructed or used as to cause a nuisance, is not affected by the fact that the owner has, in the construction and use of his engines, complied with all the provisions of the Locomotive Acts.—*Gater v. Ranson and another*, Ct. of App., 1 November 1889.

Sheriff Court Reports.

SHERIFF COURT OF ORKNEY AND ZETLAND.

Sheriff ARMOUR.

JAMES MOWAT v. THE MAGISTRATES AND TOWN COUNCIL OF STROMNESS.

Expenses—Public trust—Personal liability for expenses.—The magistrates and councillors of a burgh of barony are not personally liable for expenses unless they have litigated *in mala fide* or improperly and oppressively.

Circumstances in which *held* that they had not done so.

The material facts sufficiently appear from the following interlocutor and note:—

"*Kirkwall, 2nd November 1889.*—The Sheriff-Substitute having considered the motion for the pursuer to have the defenders found

liable personally, and conjunctly and severally, in expenses, and the whole process, Refuses said motion, and finds neither party entitled to the expenses incident thereto ; and decerns.

(Signed) "S. B. ARMOUR.

"*Note.*—So far back as May 1885, the heritors of Stromness and the defenders were negotiating for a settlement of their respective rights in the Stromness market-place. To this end, on 9th April 1886, an agreement was entered into between the defenders and the pursuer, as representing the heritors, that a special case should be presented to the Court of Session. On the faith of this, the pursuer incurred certain law expenses in preparing the special case. The defenders, however, refused to go on, and this action was raised to recover these expenses. The Sheriff-Substitute (Mellis) decided that the defenders had good grounds for their refusal, and assolizied them ; but on appeal the Sheriff reversed and practically treated the action as one *ad factum præstandum*, by remitting to a neutral agent to prepare a special case along with the parties. A case was ultimately presented to the Second Division of the Court of Session, and on 29th February 1889 judgment was obtained. Pending the judgment of the Court of Session, this action was sisted. Thereafter, the Sheriff assessed the damages caused to the pursuer by the defenders' breach of agreement at the sum of £4, 13s. 6d., and found them liable in modified expenses to the extent of £68, 6s. 3d., reserving the question of their personal liability. Since then the defenders have been duly charged to make payment, but without result, and the motion for decree against them personally has now been renewed. A preliminary argument was stated that the case having been before the Sheriff on appeal since 16th May 1887, a formal remit was necessary before I could deal with the present motion. I regard the interlocutor of 30th July 1889, however, as equivalent to such a remit, and though I am bound to say I feel a considerable amount of delicacy in having to review the whole process, I proceed to consider the question whether persons sued as the magistrates and council of a burgh of barony can be decerned against personally for expenses? It appears from *Young v. Nith Commissioners* (July 6, 1876, 3 R. 991) that this difficult and important question is still open for decision. The Lord Justice-Clerk (Moncreiff) there observed, 'I am not prepared to say whether, in certain circumstances, a body of public trustees might not render themselves liable for the expenses of an action unsuccessfully maintained by them, nor to say what effect the knowledge that they had no funds might have on the question of liability. Perhaps there might be a distinction between actions brought by trustees and those in which they are called into Court. . . . I am disposed to reserve any question of personal liability for expenses, in the event of the statutory funds proving insufficient.' With the exception of this abortive attempt to obtain decision, it seems that the question has never been raised in the

case of a public trust—possibly because, as was there explained, ‘A public trust so impecunious was not often met with.’ In these circumstances one is thrown back on the more or less analogous cases of a trustee in a sequestration, testamentary trustees, and executors. It is stated by Lord M'Laren (Trusts, vol. ii. p. 69) that, ‘subject to certain exceptions, a trustee is generally liable to creditors for any expense which may be occasioned by opposition on his part to their just demands. That the enforcement of this principle entails no hardships to the trustee, is apparent from this simple consideration, that the trustee is not bound to go on with the litigation after the funds available for defending the action are exhausted.’ His Lordship then goes on to point out that a trustee may require a guarantee from his constituent, or may escape from prospective liability by resigning. The learned author, however, does not appear to have had before him the case of a public trust, and, with great deference, it appears to me that the cases he cites, while they establish his dictum as applicable to the case of trustees in bankruptcy, fall short of doing so as regards gratuitous testamentary trustees, much less trustees under a public trust as here. Many of the decisions are old in date and imperfectly reported, but they seem to establish, not that gratuitous trustees are personally liable as a general rule for expenses, but, on the contrary, that they are only liable in certain exceptional circumstances, or, to use the words of Professor Bell (Pr., §2000), for the expense of litigation conducted *in mala fide*, or improperly and oppressively. It is unnecessary to refer to the cases affecting trustees in bankruptcy. They are summarized in Goudy (Bankruptcy, p. 336), and the only question is whether they apply to gratuitous trustees, acting under public as well as private trusts. In my judgment, the weight of authority—as well as principle—points to a negative answer. The cases may be divided into two groups—(1) those in which the trustees were held not liable, and (2) those in which they were held liable. 1. In *Dickson v. Bonar's Trustees* (Nov. 20, 1829, 8 S. 99), the trustees, on the death of their constituent, sisted themselves as defenders to an action which raised a question purely of fact. Extra-judicial attempts were made by the pursuer to satisfy them of the ill-founded character of the defence, but without success; and to ascertain the facts disputed, the case was remitted to a jury. The day of trial was fixed, the jury cited, and all expenses incurred, when the agent for the trustees (one of their own number) threw up the case. The defenders were granted delay only on condition of these expenses being paid. When the case came on again the expenses had not been paid, but the defenders gave in a minute admitting the pursuer's averments. Decree was accordingly given in favour of the pursuer, but the trust estate being insolvent, the question arose whether the expenses of process should be awarded against the trustees personally or *qua* trustees. For the pursuer it was argued—(1) (as laid down by Lord M'Laren) that it was a general principle of law, that trustees who have conducted a litigation, even in good faith, are

personally liable for expenses ; and (2) that in any case the conduct of the defenders was such as to render them so. The Court negatived both contentions, the Lord Justice-Clerk (Boyle) observing 'undoubtedly, if trustees do not conduct the litigation *bona fide*, they will be liable, but I see nothing against them here.' The same question was again-raised in *Kirkland v. Crichton* (Feb. 3, 1882, 4 D. 613), where testamentary trustees raised an action against a firm of which the testator had been a partner, for payment of a bill for £200 granted to the testator, and were met by a counter-action of count and reckoning as to the testator's intrusions with the effects of the company. Decree was pronounced in the latter action against the trustees as his representatives for a sum of upwards of £600 ; but the Second Division recalled an interlocutor which had been pronounced in the Sheriff Court, finding the trustees personally liable in expenses. Lord Medwyn said, 'No doubt trustees may so misconduct themselves as to render themselves personally liable, more especially if they litigate with the trust funds, but it must be a strong case to make them so where the trustees are bound to support the trust fund, and there has been no improper litigation. . . . To render trustees so liable there must be *mala fides*.' In the face of these cases, there seems some difficulty in applying the general rule formulated by Lord McLaren to the case of gratuitous trustees, more especially as their authority does not seem in any way shaken by the next group in which trustees were held personally liable. 2. In *Clyne v. Clyne's Trustees* (1840, 2 D. 554), the Second Division of the Court of Session held the trustees liable for the expenses of process personally. They did so, as the interlocutor bears, 'looking to the circumstances of the case, to the character of the whole litigation, and to the terms of the judgment of the House of Lords and subsequent proceedings.' The action was one of reduction *ex capite lecti*. The pursuer, who was the heir-at-law, was only left a small annuity under the deed sought to be reduced, and he appears to have sued *in forma pauperis*. (See 2 D. 243, which throws some light on this case.) The trustees would seem to have contested the case in a most determined fashion, taking it through every Court, and at length to the House of Lords. The reports of that day do not, unfortunately, record the judges' opinions ; but from the interlocutor just quoted there can be little doubt that the Court considered that the trustees had conducted the litigation in an oppressive and improper manner, their object being obviously to take advantage of the pursuer's want of funds. *Kay v. Wilson's Trustees* (Mar. 6, 1850, 12 D. 845) was an action of damages for seduction against the testamentary trustees of the seducer, who was dead, and the ground on which the trustees were held personally liable appears from the following passage from Lord President Boyle's opinion : 'If the defenders had read the letters produced in process, and taken the slightest trouble to investigate the circumstances, they would have seen that their opposition to the pursuer's claim was hopeless.' The trustees in this case were also legatees—a

ground on which Lord Mackenzie founded his judgment. The case of *Adam and Forsyth v. Forsyth's Trustees* (Nov. 16, 1867, 6 M. 31) was quoted, but it can hardly receive much weight as an authority, as it is entirely special. The action was at the instance of the assignee of one of the beneficiaries under a trust, to have a resolution of the trustees reduced as *ultra vires*. The Court reduced the resolution, and found the trustees personally liable in expenses. The trustees and the beneficiaries were, however, identical, so that obviously the question raised was very different from the case of trustees protecting the trust fund from the claims of third parties. The litigation was practically between the assignees of one beneficiary against the remaining beneficiaries, calling themselves trustees, and they were therefore very properly made liable as individuals. In *Law v. Humphrey* (July 20, 1876, 3 R. 1192), an executor was found personally liable in expenses, reserving his relief against the free executry estate, if any. The Lord President (Inglis) said: 'As regards the question of expenses, where an executor conducts a litigation reasonably, he ought not to be made liable if he fails; but here I think the defences are most unreasonable, the allegations as to fraud and facility being such as the defender must have known to be untrue.' The case of *Raeburn v. Dawson* (June 14, 1831, 9 S. 728) was quoted as establishing that as a general rule, apart from improper conduct, trustees are personally liable for the expenses of a litigation. The trust there, however, was one for creditors, and it is of course admitted that trustees in bankruptcy, who receive payment, come within the rule mentioned. *Jackson's Trustees v. Black* (May 31, 1832, 10 S. 597) was also referred to, but it is so briefly reported that it is not altogether clear whether the trustees were found personally liable in expenses at all. If they were, it was on the usual ground, viz. unwarrantable conduct in the litigation. They had improperly opposed a decree of constitution against the trust estate at the instance of a creditor, when he was clearly entitled to it. In the most recent case, *Young v. Nith Commissioners* (v. *supra*), the principle recognised in the foregoing cases was assented to at all events by Lord Ormidale, who observed (13 S. L. R. 640). 'Had this case been one in which an improper litigation was carried on by the Commissioners, it would have been quite right to find them personally liable, but that is not so. In such a case as that, the public funds would not be liable; here they are so.' It appears to me, then, that the result of these cases is to establish a distinction between trustees in bankruptcy (whether the trustee in a sequestration or other judicial process, or a trustee under a voluntary trust for creditors) and gratuitous trustees, acting under private or public trusts. In the case of the former, the rule as to expenses is that laid down by Lord McLaren—they are liable personally whether in good faith or bad faith. In the case of the latter, the rule is, in the words of Professor Bell, that they are only liable when the litigation is conducted *in mala fide* or improperly and oppressively. Whether there is a sufficient differ-

ence between the position of a trustee in bankruptcy and that of a town councillor or other public trustee, to warrant the above distinction as a matter of principle, it is perhaps not necessary to inquire, seeing that the matter is regulated by authority. It may be pointed out, however, that the former has a direct personal interest in the trust funds (the bankrupt estate) in respect of the percentage he receives as commission on the gross amount of property recovered by him. The constituents in the two cases are also very different bodies, and it would seem that a trustee in a sequestration can obtain indemnification from his constituents where a town councillor of a burgh of barony cannot. To make such a town councillor personally liable for expenses where he had no personal interest in the litigation, and no claim for indemnity against the burgesses, would certainly involve considerable hardship. *Ex hypothesi*, he is only doing his best to guard the trust funds or common good against what he considers to be improper claims, and so long as he has reasonable grounds for his opposition and a reasonable sufficiency of trust funds to meet expenses, it does not seem equitable to call upon him to supply any deficiency from his private resources. The pursuer in such a case as this calls as defenders a body having a corporate existence and a *persona* entirely separate from the various individuals composing it. If the corporation is cast, and has not sufficient funds to pay expenses, the pursuer is in no worse position than if he had pursued a private defender, for it is a matter of daily occurrence that a successful pursuer at the end of a litigation finds that his antagonist is a man of straw. And, lastly, whatever may be said of the policy of compelling private trustees to avoid personal liability by resignation, if the town council of a burgh such as this, when threatened with a doubtful litigation, could only avoid personal liability for expenses by immediate resignation, it would certainly be productive of some confusion. Assuming, then, the law to be as stated, the pursuer can only succeed in his motion on showing that the defenders have conducted this litigation '*in mala fide*, or improperly and oppressively,' and I am of opinion that he has failed to do so. I feel somewhat at a disadvantage in dealing with this aspect of the question, involving as it does a review of the whole process—now a very bulky one—(1) because I have not had the advantage of hearing the arguments at the various stages, and I am bound to say there are some of the proceedings I cannot quite follow; and (2) because I am unwilling to express any opinion at variance with those of the learned judges who have already decided the case on its merits. The main fact in favour of the defenders is that they secured a judgment by the Sheriff-Substitute in their favour. It can therefore scarcely be said that their conduct was unreasonable in fighting a hopeless case. Nor does an examination of the proof, whether oral or documentary, lead me to characterize the defenders' conduct by that term. Shortly stated, the facts material in deciding whether the defenders acted in good faith are these:—On 9th April 1886, the pursuers, as representing the heritors of Stromness,

agreed to adjust a special case to have a long-standing dispute about the Stromness market-place determined. As I understand the agreement, the parties were to be the heritors on the one part and the defenders on the other. The pursuer, apparently without formal authority from the heritors, immediately had a special case prepared, and the draft was duly sent to the Town Clerk for revisal. Considerable delay then took place till certain documents forming part of an old division of commonry could be got from Edinburgh. When these eventually reached the hands of the Town Clerk, and were perused by the defenders, they came to be of opinion that their terms were such as to obviate all necessity for a special case. Copies were accordingly sent to the pursuer, and an intimation made to that effect. The pursuer's agent replied that the documents had been in his hands for some time—in fact, when he sent the draft special case for revisal—and that his clients did not take the same view of their construction. It is certainly unfortunate that these documents were not communicated to the defenders when the special case was sent, for the fact seems to have created a feeling of distrust in their minds, and to have in fact converted what was an amicable suit—as every special case essentially must be—into something very much the reverse. Accordingly, on 12th October 1886, they intimated that they reiled from the agreement, their grounds for doing so being (1) that the documents alluded to made the matter too clear to require a special case, and (2) that the pursuer had no formal authority from the heritors to enter into a special case. Under the influence of the pursuer's threats, however, the defenders thought better of it. They took legal advice, and on 12th November 1886 they intimated that they dropped their first contention, and would go on with the special case, on condition that the pursuer would exhibit formal authority from the heritors. The pursuer would not listen to the proposal unless the whole of his legal expenses already incurred should first be paid, and as the defender declined to do so, this action was raised concluding for the amount of these expenses—£21. The Sheriff-Substitute, treating the case as a question of fact, assoilzied the defenders, on the ground that the agreement was that the heritors should be parties to the special case, and that as the pursuer could not or would not exhibit any formal authority which would bind the heritors, the defender could not be compelled to enter into a case with the pursuer as an individual, and therefore the pursuer's averments of damage were irrelevant. The Sheriff, on the other hand, treated the case as raising a question of law, viz. Whether an individual heritor could pursue an *actio popularis* relating to the matter, and obtain a decision which would be binding on the rest of the heritors? He decided in the affirmative. The defenders were held bound to enter into the special case with the pursuer, and in respect, no doubt, of the qualified offer by the defenders to go on with the special case, a remit was made to a neutral agent to adjust the case with the parties. The defenders seem to have acquiesced in this judgment, and the special case was

ultimately adjusted. Now in all this I am unable to find any trace of bad faith on the part of the defender. There is no suggestion that they were acting from any corrupt or improper motive, or indeed any other motive than a desire to protect the rights and the common good of the burgh. It is unnecessary and would be out of place for me to give any opinion as to whether they were entitled to prevail in the action. The question is not—Were they successful? but, Did they litigate in good faith? To my mind the proof and productions show they did. Their views may have been erroneous, both of the law and the facts, but they seem to have acted according to their lights; and, taking a retrospective view of the action, they can at least claim this—they secured a judgment in their favour originally, and though they are saddled with a bill of expenses to their opponents of £68, 6s. 3d. besides their own, they have beat down the pursuer's claim from £21 to £4, 13s. 6d. Moreover, the parties to the special case, as ultimately adjusted, were not the defenders and the pursuer alone, but the defenders and three of the heritors, including the pursuer. Looking, therefore, to the whole circumstances, I feel bound to refuse the pursuer's motion. It only remains to consider whether the fact of the defenders having litigated without sufficient funds is to be imputed as improper conduct such as to infer personal liability for expenses. The Court seem to have attached some importance to the want of funds as a criterion of good faith. Thus, in *Kirkland v. Crighton*, the Lord Justice-Clerk was careful to say, 'Our opinions do not trench on the salutary rule that trustees in general ought to see that they have funds in their hands to meet litigation in which they involve others.' On the other hand, see Lord Gifford in *Young v. Nith Commissioners*. I could well understand that trustees having no funds at all in their hands might be held *in mala fide*, but here it appears that the defenders are not in that position. They have an annual income of £10 or thereby, and they have already paid £35, being all their funds at present available, to the pursuer. No doubt these resources were somewhat inadequate with which to embark on a litigation, but it must be borne in mind that, looking to the amount concluded for, the defenders had reasonable grounds for expecting that the expenses would be taxed on the lower scale instead of the higher, as has been done—probably on account of the action being changed from a petitory one to one *ad factum præstandum*. That the defenders did not initiate proceedings, but were called into Court involuntarily, is also entitled to weight, and I therefore see no reason to change the opinion I have already expressed, viz. that the pursuer's motion must be refused. The defenders are not given the expenses of the motion because, though they were duly charged on 8th July 1887 to make payment, they took no steps towards satisfying the charge, and made no disclosure of the state of the burgh funds till after the present motion had been discussed.

S. B. A."

Act. Brown—Alt. Robertson.

SHERIFF COURT OF ABERDEEN.

Sheriff BROWN.

DON FISHERY BOARD *v.* WILLIAM MILNE, JAMES MILNE, AND
DONALD ROSS.

Carriers.—In the Aberdeen Sheriff Court, Sheriff Brown has given his decision in the case against William Milne, carter, North Street; James Milne, carter, Kintore Terrace; and Donald Ross, carter, Mortimer's Lane, Inverurie, who were charged with having had in their possession, on 19th October, on the turnpike road near Kintore, three salmon, which had been taken during close time. When proof was led, J. M. I. Scott, for the defence, said, although the net-fishing had closed, the rod and line fishing had not closed, and he argued that it was necessary for the prosecution to prove that the fish had been taken otherwise than by rod and line. He also held that the accused having got possession of the bag containing the fish in the ordinary course of their calling, the prosecution must show that they were not acting properly as carriers, but were in complicity with poachers. Mr. Bain, who appeared for the Don Fishery Board, the prosecutors, held that it was unnecessary to prove guilty knowledge, but that in any case it had been proved. The Sheriff, in giving his decision, said:—

“There is no doubt of the importance of this case both to the prosecutor and the accused, and beyond them to many engaged in the carrying trade of the country, and I felt it required, and do not regret I have given it, special consideration. The complaint charges the accused, under the 21st section of the Act of 1868, with being in possession of three salmon on the 19th of October last, at a part of the turnpike road between Kintore and Aberdeen, the date libelled admittedly falling not only within the annual close time for this district, but within the close time of all districts within the limits of the Act, that is, within Scotland. In a recent case (*Chalmers v. Bain and Murray*) it has been decided by the High Court of Justiciary that the words ‘annual close time,’ within the meaning of the statute, signify the time during which net-fishing is illegal, so that when this condition is qualified, it is no longer an objection to the relevancy of such a complaint as was at one time held, that water is open for fishing by rod and line within the limits of the Act. I do not see, however, that the respondents here take any benefit from this authority; for one of the judges who decided *Chalmers v. Bain* distinctly throws on the accused the burden of proof that the fish were caught by rod and line, and not by net, as, indeed, another learned judge had done in the earlier case of *Wilsone v. Harvey*, and not a particle of evidence was tendered that the fish in question were so obtained. Separately, I am of opinion, and that is enough to oust any question of onus—that it is abundantly proved that the fish found in the possession of the accused

were taken by net, and not by rod and line. The real importance of the case accordingly does not lie here. The accused are common carriers, or the servants of common carriers, and what they say beyond the mode of the capture of the fish is, that they innocently took possession of them in pursuance of their trade, being the contents of a parcel delivered to them for carriage, and that to convict them without evidence that they knew what they then took charge of as common carriers would be a proceeding utterly destructive of the carrying trade of the country, for there is no amount of precaution, short of the actual inspection of every parcel or box taken for carriage, that would protect carriers. In my opinion, this contention is well founded, and the prosecutor is wrong in the view he urges, that he has nothing to do, in a charge of contravening the 21st section, with the question *quo anima* the accused received the fish. I admit that on a sound construction of the statute no onus lies upon him beyond proving possession. Where the annual close time for net-fishing is universal within the limits of the Act, and proof of capture by rod and line is not forthcoming, the prescribed and only answer to such a charge is proof that the fish was caught beyond the limits of the Act. But the necessary condition of this argument is that the accused shall have possession; and the fallacy of the prosecutor's position, as it seems to me, lies in assuming that there is nothing peculiar or distinctive in the possession of a common carrier. To possess, within the meaning of the Act, there must be a conscious act, or the *animus possidendi*—that is to say, the person or the carrying company in whose custody fish illegally taken are found must, *ante omnia*, know that they are fish. If this be brought home to a common carrier, be it a railway company or anybody else, evidence of possession would undoubtedly qualify the requirements of the statute; for, as observed by Lord Young in *Chalmers v. M'Glashan*, guilty knowledge is no part or feature of the offence created by the clause, and that does not require either to be alleged or put in evidence in support of the complaint. But that in the ordinary case of a person receiving a fish knowing it to be such, the peculiarity of the case of a common carrier being that personally he does not know what he takes into custody. He has, therefore, antecedently, no possession in law, and to surround him with that condition, the prosecutor of such a charge must put in evidence facts and circumstances from which such knowledge is to be inferred; and any other view would operate incalculable hardship, and, indeed, absurdity. In the present state of the law, as I understand it, a gentleman having a salmon in his larder, under such circumstances that the only answer to his possession was proof of the fish being caught beyond the limits of the Act, would undoubtedly have all the onus thrown upon him; but a common carrier innocently carrying wares of which he does not know the quality, would not be liable in the statutory penalties on the ground of possession in the sense of mere detention, any more than an innocent bystander into whose pocket

a thief had slipped a stolen watch to avoid detection would be liable to a charge of reset of theft. But it is unnecessary to dwell on this point further, because, after full consideration, I may say anxious consideration, of the evidence, I have come to be of opinion in the end quite distinctly that there is here not only knowledge of what the parcel they took into possession contained, but guilty knowledge on the part of the accused. In coming to this conclusion, I give them full benefit of the fact—for I hold that to be proved in the case—that country carriers are in the habit of picking up parcels in many odd sort of places, and with very indefinite instructions in regard to them. I fear, however, that that is just the screen which in some cases is used to practise such illegal traffic as is here alleged, as it undoubtedly affords a ready means of preventing its detection. The case, in my opinion, starts most unfavourably against the accused, and specially against the foreman, William Milne, in so far as Kennedy, who was in the common employment, and who is said to have given the order to lift the parcel, was not called. If the trials had not been separated, this statement could not have been brought into the case; and although I have no doubt the trials were rightly separated, it has to be noted that the other two accused do not speak to this matter at all, and therefore it can only be taken as evidence by regarding the foreman as a witness for himself. Without corroboration, therefore,—and it was admitted that Kennedy was quite ready to proceed,—I cannot attach much weight to this circumstance. The suggestion that Kennedy got the order from an unknown person, might pass under cover of the facilities implied in such a carrying trade, but that cannot be extended to the failure to put Kennedy in the witness-box. Further, I hold it to be proved—and the vacillation on that point on the part of all the accused helps the conclusion—that the foreman was seen looking into the corner of the field from which the parcel was taken on the two previous days, and that goes a long way to discredit the theory of a specific order on the previous night, and to suggest a course of illegal dealing. Still further, I hold it to be unequivocally proved that on the foreman giving a direction to one of the other two accused to lift the parcel before the bailiffs disclosed themselves, he expressed his sense of the risk of doing so, and received the assurance that the foreman would accept all responsibility. There is no doubt whatever in my mind what that signifies, and that it was present to all three that they were not then acting in pursuance of their lawful calling. Nor do all the compromising circumstances end there, for the suspicion of the bailiffs who were there on the watch is of itself an element of suspicion against the accused; and there is besides an admission that on the 15th of October, also in the close time, another parcel containing fish was lifted from the same place. The consignee of that parcel is known, and it would have been most material to the case of the accused if he had been forthcoming to say that that was a consignment of fish caught by rod and line. My anxiety about the case and desire to pronounce a deliberate

judgment, were dictated by the full perception of the danger of even seeming to place a restriction on a most useful calling, but the distinct character of the evidence enables me quite satisfactorily to overcome that difficulty. On the other hand, I fully recognise the expedients that are notoriously from time to time set in motion to invade the important patrimonial interests which are here involved, and I feel I should be wanting in my duty if I did not, on sufficient cause shown, extend the aid of the Court to their protection. I find you all three guilty, being satisfied that joint possession within the meaning of the statute has been traced to you, and that you were acting with a common purpose, and with common knowledge; but in the question of punishment I see a clear ground for distinction. You, William Milne, was the ringleader, and I place on you the full responsibility which you claimed at the outset. You, James Milne and Daniel Ross, I am satisfied, although possessed of full knowledge of what was being done, were acting under influence and authority, and while I am bound to convict you, I feel I am justified in your case in stopping short of further punishment. The sentence of the Court on you, William Milne, is that you pay a penalty of £1, and a further penalty of 5s. for each of the fish traced to your possession, and pay the costs of the conviction, which I modify so as to be strictly applicable to your own case, amounting to £1, 16s.; or to suffer, on failure of the prosecutor to recover in due form within seven days, fourteen days' imprisonment."

Act. Bain—Alt. Scott.

All communications for the Editors to be addressed to the care of the Publishers, MESSRS. T. & T. CLARK, 38 George Street, Edinburgh.

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